Admitted

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1924

No. [redacted] 276

JAMES H. BLUNDELL, EXECUTOR OF THE LAST WILL AND TESTAMENT OF PATSY PAFF, DECEASED; JAUNITA BLUNDELL, OLETA BLUNDELL, ET AL., ETC., PLAINTIFFS IN ERROR,

vs.

WILLIAM R. WALLACE

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED FEBRUARY 2, 1924

(30,098)

(30,098)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 788

JAMES H. BLUNDELL, EXECUTOR OF THE LAST WILL AND TESTAMENT OF PATSY PAFF, DECEASED; JAUNITA BLUNDELL, OLETA BLUNDELL, ET AL., ETC., PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 9, 1924

[fol. a-2] [File endorsement omitted.]

IN THE

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 12123

JAMES H. BLUNDELL, Executor of the Last Will and Testament of Patsy Paff, Deceased; Jaunita Blundell, Oleta Blundell, and Patsy Blundell, Minors, James H. Blundell, Legal Guardian of said Minors, Plaintiffs in Error,

vs.

WILLIAM R. WALLACE, Defendant in Error

PETITION FOR WRIT OF ERROR—Filed January 18, 1924

To the Honorable Chief Justice of the Supreme Court of the State of Oklahoma:

Your petitioners herein, James H. Blundell, executor of the last will and testament of Patsy Paff, deceased, Jaunita Blundell, Oleta Blundell, and Patsy Blundell, minors, and James H. Blundell, legal guardian of said minors, respectfully show that on the 9th day of October, 1923, the Supreme Court of the State of Oklahoma rendered a judgment herein in favor of the defendant in error and against the plaintiffs in error in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of these petitioners, all of which more in detail appear in the assignments of error filed with this petition; that after the rendition of said judgment, and to-wit, on the — day of October, 1923, your petitioners herein filed a petition for rehearing in said cause, and that thereafter and to wit, on the 2nd day of November, 1923, an order was made by this court denying said petition for rehearing. Thereupon the opinion was filed in this cause by this court, affirming the judgment of the District Court of Garvin County, State of Oklahoma, which opinion is a part of the record in this cause, and your petitioners herein, the defendants below, respectfully show that there was a judgment in said cause in the District Court of Garvin County, State of Oklahoma, in favor of the defendant in error herein, and against your petitioners, decreeing that the defendant in error was the owner of an undivided one-third interest in certain lands, the allotment of Patsy Paff, deceased, described as the N. E. 4 of N. E. 4 of S. E. 4 of Sec. 12 township one north, range four west, and the W. [fol. 3] 2 of N. E. 4 of S. W. 4, and lots six and seven, and the S. E. 4 of S. W. 4 of Sec. 6, and the west 19.21 acres of lot one, section seven, township one north, range three west, and directing partition thereof, which said judgment upon appeal to the Supreme Court of the State of Oklahoma, was affirmed by said court, and,

Your petitioners herein further respectfully show that the said Supreme Court of the State of Oklahoma is the highest court in the State of Oklahoma in which a decision in said cause could be had, and your petitioners claim the right to remove said cause to the Supreme Court of the United States by writ of error under the Statutes of the United States of America authorizing writs of error to the Supreme Court of the United States, inasmuch as in said judgment of the Supreme Court of the State of Oklahoma, and the proceedings in said cause, certain errors were committed to the prejudice of your petitioners, all of which will in detail appear from the assignments of error filed with this petition, and because your petitioners claim in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in the rendition of its judgment, holding that section 8341 of the Revised Laws of the State of Oklahoma of 1910 controlled the making of the will of Patsy Paff, deceased, and was not in conflict with an Act of the Congress of the United States approved April 26, 1906, and especially section 23 thereof, the said Patsy Paff, being an Indian citizen, and a member of the Choctaw tribe of Indians, and at the time of her death, a resident citizen of the State of Oklahoma, and because the said Supreme Court of the State of Oklahoma erred in holding that the will executed by Patsy Paff, deceased, wherein she devised the property herein involved to the plaintiffs in error herein, was not valid and binding under said Act of Congress of April 26, 1906, entitled "An Act to provide for final disposition of the affairs of the Five Civilized Tribes of the Indian Territory, and for other purposes.

[fol. 4] Wherefore, your petitioners claim and says that by a final judgment in a suit in the highest court of the State of Oklahoma, in which a decision in said cause could be had, there was drawn in question the proposition of law as to whether or not the Act of Congress of April 26, 1906, entitled "An Act to provide for the final disposition of the Affairs of the Five Civilized Tribes of the Indian Territory, and for other purposes, controlled the making of the will of a member of said Five Civilized Tribes over a statutory provision of the Legislature of the State of Oklahoma, being section 8341 of the Revised Laws of 1910. And wherefore, and in accordance with the statutes in such case made and provided, your petitioners pray that a writ of error may issue in their behalf out of the Supreme Court of the United States for the correction of the errors, an assignment whereof is filed with this petition, and that a transcript of the record, proceedings, files, and papers in this cause, duly authenticated may be sent to the Supreme Court of the United States, and your petitioners pray for the allowance of a citation in due form of law, and your petitioners will ever pray.

James H. Blundell, Executor of the Last Will and Testament of Patsy Paff, Deceased; Jaunita Blundell, Oleta Blundell, and Patsy Blundell, Minors; James H. Blundell, Legal Guardian of said Minors, Petitioners, by Reford Bond, Alger Melton, Adrian Melton, Their Counsel.

[fol. 5] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed January 18, 1924

Comes now James H. Blundell, executor of the last will and testament of Patsy Paff, deceased, Jaunita Blundell, Oleta Blundell, and Patsy Blundell, minors, and James H. Blundell, legal guardian of said minors, plaintiffs in error in the above entitled cause, and respectfully shows that in the trial of said cause and in the rendition of the judgment of the trial court, and in the opinion and judgment of the Supreme Court of the State of Oklahoma in said cause, manifest errors were committed to their prejudice, which are apparent from the record therein, that the errors committed by the trial court and affirmed by the Supreme Court of the State, and committed by the Supreme Court of the State in its opinion and judgment in said cause, are more fully and particularly set forth as follows:

1. The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Garvin County, State of Oklahoma.

2. The Supreme Court of the State of Oklahoma erred in not reversing the judgment of the District Court of Garvin County, State of Oklahoma.

3. The Supreme Court of the State of Oklahoma erred in holding that section 8341 of the Revised Laws of 1910 of the State of Oklahoma were not in conflict with an Act of Congress of the United States of April 26, 1906, entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes.

[fols. 6 & 7] 4. The Supreme Court of the State of Oklahoma erred in holding that the will of Patsy Paff, deceased, was invalid and not sufficient in law to divest David Paff, the remote grantor of the defendant in error, William R. Wallace from all right, title and interest in the lands described in said will of the said Patsy Paff, deceased.

5. The Supreme Court of the State of Oklahoma erred in holding that under the Act of Congress of April 26, 1906, the said Patsy Paff, a member of the Choctaw tribe of Indians could not under said Act of Congress make a will of her lands that by its terms devised all of her real estate to persons other than her husband, David Paff, as provided by section 8341 of the Revised Laws of 1910, of the State of Oklahoma,

For which errors the said James H. Blundell, executor of the last will and testament of Patsy Paff, deceased, Jaunita Blundell, Oleta Blundell, and Patsy Blundell, minors and James H. Blundell, legal guardian of said minors, plaintiffs in error pray that the said judgment of the Supreme Court of the State of Oklahoma and the District Court of Garvin County, State of Oklahoma, be reversed and judgment rendered in favor of these plaintiffs in error, and for such other and further relief as to the court may seem just and proper, and for their costs.

James H. Blundell, Executor of the Last Will and Testament of Patsy Paff, Deceased; Jaunita Blundell, Oleta Blundell, and Patsy Blundell, Minors, and James H. Blundell, Legal Guardian of said Minors, by Reford Bond, Alger Melton, Adrian Melton, Attorneys for Plaintiffs in Error.

[fol. 8] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Title omitted]

WRIT OF ERROR—Filed January 18, 1924

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges and Clerk of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said Court before you, or some of you, being the highest court of law or equity in said state, in which a decision could be had in said suit between James H. Blundell, executor of the last will and testament of Patsy Paff, deceased, Jaunita Blundell, Oleta Blundell and Patsy Blundell, minors, and James H. Blundell, legal guardian of said minors, plaintiffs in error and William R. Wallace, defendant in error, in the Supreme Court of said state, wherein a judgment was rendered in said court on the 2nd day of November, 1923, in favor of said defendant in error, and against the plaintiffs in error, and wherein, was drawn in question the validity of a treaty, or statute, of, or an authority exercised under the laws of the United States, and the decision was against their validity; and wherein was drawn in question the validity of a statute, of or an authority exercised under the laws of said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of their validity; and it therein appears that manifest error hath happened, to the great damage of said plaintiff in error, as by his complaint, petition and assignment of errors appears:

[fol. 9] We, being willing that error, if any hath been, should

be duly corrected and fully and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington, D. C. within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to laws and customs of the United States should be done.

Witness the Honorable Wm. H. Taft, Chief Justice of the Supreme Court of the United States, this 18th day of January, 1924.
Harry L. Finley, Clerk United States District Court for Western District of Oklahoma. (Seal U. S. District Court.)

Approved and allowed by the Honorable J. T. Johnson, Chief Justice of the Supreme Court of the State of Oklahoma, this 18th day of January, 1924.
J. T. Johnson, Chief Justice Supreme Court of Oklahoma.

Attest: Wm. M. Franklin, Clerk Supreme Court of State of Oklahoma, by Reuel Haskell, Jr., Asst. (Seal of Supreme Court, State of Oklahoma.)

[fol. 10] [File endorsement omitted.]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Title omitted]

PETITION IN ERROR—Filed March 15, 1921

The said James H. Blundell, executor of the last will and testament of Patsy Poff, deceased, Jaunita Blundell Oleta Blundell, minors and James H. Blundell, legal guardian of said minors, complain of W. R. Wallace, defendant in error, for that the said W. R. Wallace at the January term of the District Court within and for Garvin County, State of Oklahoma receover-d judgment by the consideration of said court against the said James H. Blundell executor of the last will and testament of Patsy Poff, deceased, Jaunita Blundell, Oleta Blundell and Patsy Blundell minors, James H. Blundell legal guardian of said minors, in a certain acti-n then pending in the said court, wherein the said W. R. Wallace was the plaintiff and the said James H. Blundell, executor of the last will and testament of Patsy Poff, deceased, Jaunita Blundell, Oleta Blundell, minors, James H. Blundell legal guardian of said minors were defendants. Certified transcript of the record of said court and

the original casemade duly certified and attested is hereto attached, marked "Exhibit A" and made a part of this petition in error.

And the said James H. Blundell, executor of the last will and testament of Patsy Poff, deceased, Jaunita Blundel, Oleta Blundell, minors and James H. Blundell guardian of said minors aver that there is error in said record and proceedings in this, to-wit:

[fols. 11 & 12] 1. The said District Court of Garvin County, erred in overruling motion of the plaintiffs in error for new trial.

2. The said District Court of Garvin County, erred in holding as a matter of law that the rights of the plaintiff in error's decedent, Patsy Poff to make a will was controlled by Section 8341, Revised Laws 1910.

3. The said District Court of Garvin County, erred in holding that the will executed by the said Patsy Poff, deceased was not sufficient to convey and vest the fee title in the lands therein described to the said beneficiaries under said will.

4. The said District Court of Garvin County, erred in holding that the defendant in error's decedent, David Poff husband of Patsy Poff, deceased, was entitled to recover any interest in said land div-sted under the terms of sa*le* will.

5. Said District Court of Garvin County, erred in refusing to render judgment in favor of the p*ali*ntiffs in error and against the defendant in error.

6. The said District Court of Garvin County, erred in rendering judgment herein in favor of the defendants in error and against the plaintiffs in error.

Wherefore, plaintiffs in error pray that the said judgment so rendered be reversed, set aside and held for naught and that a judgment may be rendered in favor of the plaintiffs in error and against the defendant in error upon the agreed statement of facts upon which this cause was tried and that the plaintiffs in error be restored to all rights which they have lost by reason of the rendition of said judgment by said District Court of Garvin County, Oklahoma, and for such other relief as the plaintiffs in error may be entitled to receive.

Bond, Melton & Melton, Counsel for Plaintiffs in Error.

[fols. 13 & 14] IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Title omitted]

Case Made—Filed in District Court March 10, 1921; Filed in Supreme Court March 15, 1921

[File endorsement omitted.]

[fol. 15] IN THE DISTRICT COURT FOR GARVIN COUNTY

[Title omitted]

PETITION—Filed June 29, 1920

Comes now the plaintiff, W. R. Wallace, and represents and shows to the Court that he is a resident of Garvin County, Oklahoma, and that the lands hereinafter referred to, or the major portion of same are situated within the said County; that the defendants, James H. Blundell, Executor of the last will and testament of Patsy Poff, deceased, Juanita Blundell, Oleta Blundell and Patsy Blundell, are each residents of said County; that the defendant, James H. Blundell, is the duly appointed, qualified and acting executor of the estate of Patsy Poff, deceased, having been appointed such executor on the 18th day of September, 1916 by the County Court of Garvin County, Oklahoma.

Count One

For cause of action against said defendants, and each of them, plaintiff states that Patsy Poff was a duly enrolled Choctaw Indian of one half blood, enrolled opposite roll number 315 on the rolls of said tribe as prepared by the Commission and Commissioner to the Five Civilized Tribes, and as such allottee she was allotted as a portion of her distributive share of the lands of the said tribes the following described lands, to-wit:

[fol. 16] The Northeast Quarter of the Northeast Quarter of the Southeast Quarter of Section 12, Township 1 North, Range 4 West in Stephens County, Oklahoma, being a portion of her allotment other than a homestead.

The West Half of the Northeast Quarter of the Southwest Quarter; Lots 6 and 7 and the Southeast Quarter of the Southwest Quarter of Section 6, and the West 19.20 acres of Lot 1 of Section 7, all in Township 1 North, Range 5 West in Garvin County.

said lands having been allotted to her as her homestead allotment.

That patents were duly issued to her conveying said lands to her on the — day of ——, 19—; that copies of said patents are hereby attached marked "Exhibits A and B" respectively and made a part hereof.

Plaintiff says that on the 17th day of August, 1916 the said Patsy Poff died testate, a resident of Garvin County Oklahoma, seized and possessed of the above described lands, and that thereafter and on September 5, 1916, a petition for the probate of said will was duly filed in the County Court of Garvin County, Oklahoma by James H. Blundell, the executor named therein; that thereafter on the 18th day of September, 1916, said will was duly admitted to probate as the last will and testament of the said Patsy Poff, deceased, and the said James H. Blundell was duly appointed as executor of said will and since said time has acted in said capacity, and is now such executor; that a copy of said will is hereto attached marked "Exhibit C" and made a part hereof.

Plaintiff says that the said Patsy Poff, deceased, left at her death [fol. 17] a surviving husband, whose name was David H. Poff and that the said Patsy Poff and David H. Poff were duly and legally married prior to 1898, and that the said David H. Poff at the time of the death of the said Patsy Poff was the legal husband of the said Patsy Poff; that under the terms and provisions of said will as set out in the third paragraph thereof the said Patsy Poff, gave, devised and bequeathed unto the said David H. Poff, the sum of $5.00; that the value of the estate left by the said Patsy Poff at the time of her death was several thousand dollars; that the said Patsy Poff was without authority by reason of Section 8341 of the Revised Laws of 1910, of the State of Oklahoma to devise and bequeath to persons other than the said David H. Poff more than two thirds of the property of which she died seized and possessed; that said sum of $5.00 is far less than one third of the value of the estate left by the said Patsy Poff, deceased, and that said will was inoperative and void as to the said David H. Poff and that upon the death of the said Patsy Poff, there was vested in the said David H. Poff by inheritance and undifided one third interest in fee simple to the lands above described; that the above described property was acquired during the coverture of the said Patsy Poff with the said David H. Poff.

Plaintiff says that thereafter and on the — day of ——, 1918, the said David H. Poff died, a resident of Oklahoma County, Oklahoma, testate, seized and possessed of an undivided one third interest in and to the above described lands, as above set out, and that thereafter Katherine Bailey was duly appointed by the County Court of Oklahoma County, as Administratrix with the will annexed of the [fol. 18] estate of said David H. Poff, deceased that under and by virtue of the terms of said will Katernine Bailey was the sole devisee and legatee under said will and became possessed of all the right, title and claim and interest of the said David H. Poff in and to the lands above described; that a copy of said will is hereto attached and marked "Exhibit D" and made a part hereof; that thereafter and on the — day of June, 1920, the said Katerine Bailey, joined by her husband —— Bailey, made, executed and delivered to this plaintiff, W. R. Wallace, a warranty deed conveying all the right, title, interest and estate inherited by the said David H. Poff, and devised to the said Katerine Bailry in and to the above described lands; that a copy of said deed is hereby attached marked "Exhibit E" and made a part

hereof; that by virtue of said conveyance this plaintiff is now the owner of an undivided one third interest in and to the lands above described.

Plaintiff says that notwithstanding the fact that said will is void and imperative as against this plaintiff and his grantors hereinabove set out, the defendants above named deny plaintiff's interest in and to said lands and refuse to recognize the same; that the claims of said defendants under and by virtue of said will constitute a cloud upon plaintiff's title which plaintiff is entitled to have removed by order of this Court.

That the claim of said defendant, Patsy Blundell, if any, are unknown to this plaintiff.

Wherefore, plaintiff prays that defendants and each of them be cited to appear herein, and that they and each of them be required [fol. 19] to set up whatever claims they have, if any, in and to said lands, and that upon a final trial her-of, the Court render judgment, decreeing and holding inoperative invalid and void the provision of said will, so far as the same appears to fivest the said David H. Poff of any interest in and to said lands; that the title of this plaintiff be decreed to be a fee simple title in and to an undivided one third interest in the above described lands, and that said title be quieted as against said will and the claims of said defendants, and each of them, and that said defendants and each of them be forever perpetually restrained and enjoined from asserting any right, title, claim, or interest in and to said lands as to said undivided one third interest adverse to the right, title, claim and interest of this plaintiff therein, and for such other and further relief with costs hereun expended as plaintiff may show himself entitled to receive in the premices.

Count Two

And as a further cause of action against the said defendants and each of them, plaintiff states that he hereby adopts and makes a part of this count all the allegations and statements of fact hereinbefore set out in County One, the same as if copied at length herein.

Plaintiff says that said lands are held in common and undivided by himself, and the defendants, Juantia Blundell and Oleta Blundell; that he owns an undivided one third interest therein and that each of said last named defendants owns an undivided one third interest therein.

Plaintiff says that the defendant, James H. Blundell as executor of [fol. 20] the last will and testament of Patsy Poff, deceased is in possession of said lands as such executor, only for the purpose of administering said estate; that all the obligations of said estate have been fully paid and that on the 15th day of October, 1917, the said James H. Blundell filed a final report in the County Court of Garvin County, Oklahoma, in the matter of said estate showing the full payment of all claims against said estate and praying for an order of distribution therein; that the further possession of said estate by the said James Blundell as executor, by reason thereof is unnecessary.

Whereof, plaintiff prays in addition to the prayer set out in Count One hereof that the Court decree the interest of the owners in said lands, and that the Court partition the same according to such respective interests, and for such other and further relief with costs as plaintiff may show himself entitled to receive in the premises.

Count Three

And as a further cause of action herein, plaintiff adopts all the allegations and statements of fact, made or contained in Counts One and Two of this petition, the same as if copied at length herein.

Plaintiff further says that said defendant, James H. Blundell, as such executor is in possession of said lands; that plaintiff is the owner of an undivided one third interest therein and is entitled to the immediate possession of same; that this plaintiff, Juanita Blundell and Oleta Blundell are co-tenants of said lands and that James H. Blundell is in possession thereof as executor only for the administration of said estate and the payment of debts, which debts have long [fol. 21] since been paid; that possession thereof has been demanded, but the said defendant fails and refuses to surrender possession to this plaintiff as such co-tenant.

Wherefore, premi*ese*, considered, plaintiff prays that he have judgment for possession of said lands and for such other and further relief with costs as he may show himself entitled to receive in the premises.

Count Four

And as a further cause of action plaintiff adopts all the allegations and statements of fact made or contained in Counts One, Two and Three of this petition, the same as if copied at length herein.

Plaintiff further says that the defendant James H. Blundell, as such executor, has been in possession of said lands since 1916 and has been collecting the rents, revenues and profits arising therefrom; that he has wholly failed and refused to account to thie plaintiff or to the grantors of the plaintiff for said rents, revenues and profits; that same amount to the sum of $500.00 for each year for the years 1915, 1917, 1918, 1919, and 1920, or a tot*la* sum of $2,500.00; that this plaintiff is the owner of and entitled to said rents under and by virtue of a written assignment therefrom from the said Katherine Bailey, a copy of which said written assignment is hereto attached, marked "Exhibit F" and made a part hereof.

Wherefore, premises considered plaintiff prays that he have judgment against said defendant, James H. Blundell as such executor in the sum of one third of said total rents, or the sum of $833.33 1/3, [fol. 22] for the rents for said years, and for all costs herein laid out and expended and all other and further relief to which he may show himsel- entitled in the premises.

Blanton, Andrews & Osborn, Bowling & Farmer, Attorneys for Plaintiff.

Exhibit E to Petition

Warranty Deed

Know all men by these presents, that Katherine Bailey Welch and her h-sband William Earl Welch of Oklahoma County, State of Oklahoma parties of the first part, in consideration of the sum of One Thousand Dollars in hand paid the receipt of which is hereby acknowledged do hereby grant, bargain, sell and convey unto W. R. Wallace of Garvin County, State of Oklahoma, party of the second part, the following described real property and premises, situated in Garvin and Stephens County, State of Oklahoma, to-wit:

The West half (½) of the Northeast Quarter (N. E. ¼) of the Southwest Quarter (S. W. ¼) and Lot Six (6) and Lot Seven (7) and the Southeast Quarter (S. E. ¼) of the Southwest Quarter (S. W. ¼) all in Section Six (6) and, the West 19 and 20/100 acres of Lot One (1) Section Seven (7) all in Township 1, North, Range Three (3) West, and the Northeast Quarter (N. E. ¼) of the Northeast Quarter (N. E. ¼) of the Southeast Quarter (S. E. ¼) of Section 12, Township 1 North, Range Four (4) West, containing 167 and 50/100 acres more or less together with all the improvements thereon and the appurtenances thereunto belonging and warrant the title to the same.

To have and to hold said described premises unto the said party [fol. 23] of the second part his heirs and assigns forever, free, clear and discharged of, and from former grants charges, taxes, judgments, mortgages and other liens and incumbrances of whatsoever nature.

Signed and delivered this 16 day of June, 1920.

Katherine Bailey Welch, William Earl Welch.

(Documentary Stamp $1.00)

State of Oklahoma,
Oklahoma County:

Before me, a Notary Public, in and for the said County and State, on this 16th day of June, A. D. 1920, personally appeared Katherine Bailey Welch and William Earl Welch to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and official seal, the day and date above written.

M. C. Jay, Notary Public. My commission expires 1st day of April, 1924. (Seal.)

(Indorsed)

STATE OF OKLAHOMA,
Garvin County, ss:

This instrument was filed for record on the 17 day of June, 1920, at 10:30 o'clock A. M. and duly recorded in deed record — on page —. Fee, —.

Harry Oliphant, County Clerk, by E. Westbrook, Deputy.

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24 EXHIBIT C TO PETITIONS

U. S. A., S. OF OKLAHOMA,
Co. of Grady:

Last Will and Testament of Patsy Poff

In the name of God, Amen.

I, Patsy Poff, of full age, realizing thee uncertainty of life and the certainty of death, being of cound and disposing mind and memory but in feeble bodily health, and desiring to dispose of my wordly affairs while I have the strength to do so, and to that end do make, sign, publish and declare this instrument to be my last well an dtestament, hereby revoking all other wills, or parts of wills, by me as heretofore made.

First. After death I desire that my beody be given decent Christian burial according to the rites of Church and with such expenses as are or shall be compatible with the financial condition of my estate, and I so direct.

Second. I further direct that all my just debts, and expenses of last illness abd funeral expenses be paid as promptly as the condition of my estate will permit and I hereby direct and empower my executor to dispose of sufficient personal property, if I leave so much, if not, then of real estate, to pay said debts and expenses without unnecessary delay.

Third. I give, devise and bequeath to my husband, David H. Poff, the sum of Five Dollars.

Fourth. I give, devise and bequeath unto each of my grand children, namely; Jane Moncrief, Lee Monderief, Georgie Moncrief, Patsie Blundell (nee Mann) the sum of Five Dollars each, and to the heirs of Perry H. Blakely, deceased, the sum of $5.00.

[fol. 25] Fifth. To my great grand daught-rs namely, Juanita Blundell and Oleta Blundell, if they survive me, if not to their mother, Patsy Blundell, if she should faile to survive me, then to the living heirs of Patsy Blundell, I hereby give divise and bequeath in fee, the remainder of my property, real and personal, with all rights, choses in action, claims, credits, sums of money due or to become due from the United States government or any Indian

Tribes or Nations, by reason of any annuity, treaty, sale of lands, minerals, oils, mines, timbers of any and all whatsoever, and all other property rights whatsoever, which I may own or pos-ess or be entitled to at my death, or thereafter accruing.

Sixth. I hereby appoi*j*t James Blundell the executor without bond of this my last will and testament with power in him to execute the provisions herein and direct that same be executed as soon as practicable after my death and hereby grant him all power and authority necessary to carry out and perform the provisions hereof.

In testimony -herein I have hereunto set my hand and affixed my seal, u*n*sing a scroll for a seal, at Rush Springs Grady Count-, Oklahoma, this the 26th day of November, 1912.

Patsy Poff (her X mark).

I, Ed Coyle, of Rush Springs, Okla., a Notary Public in and for the above named County and State, did on this the 26th day of November, 1912, at the request of Patsy Poff, sign her name to the foregoing will in her presence and in the presence of subscribing witnesses.

Ed Coyle.

Formal execution omitted.

[fols. 26–33] [File endorsement omitted.]

[fol. 34] In the District Court of Garvin County

[Title omitted]

Separate Answer of Patsy Blundell

Comes now Patsy Blundell, one of the defendants in the above styled and entitled cause and for her answer to the petition of the plaintiff herein filed, says that she adopts all of the answer of her co*n*-defendants Oleta Blunde*nn* and Juanita Blundell, as her answer herein and prays that the plaintiff take nothing, and that she be discharged with her costs.

Bond, Melton & Melton, Counsel for Defendant Patsy Blundell.

[fol. 35] In the District Court of Garvin County

[Title omitted]

Separate Answer of Juanita Blundell and Oleta Blundell, Minors

Come*s*, now Juanita Blundell and Oleta Blundell, minors by their guardian James H. Blundell and Adrian Melton guardian ad litem, and for answer to the petition of the plaintiff herein filed, say:

I

These answering defendants allege that they and each of them are minors, and that James H. Blundell is their legal guardian and that such guardianship is now in full force and effect, and is pending in the County Court of Garvin County, Oklahoma.

II

For answer to plaintiff's petition herein these defendants say that they admit that Patsy Poff was a duly enrolled Choctaw Indian, of one half Indian blood, enrolled opposite No. 315, on the approved rolls of said tribe and admit that there was allotted and patended to said Patsy Poff during her life time the lands in the first paragraph of the plaintiff's petition described, located in Stephens and Garvin Counties, Oklahoma, and admit that the patents were issued to said allottee conveying to her said lands as in said petition alleged, and [fol. 36] admit that the copies attached to plaintiff's petition are true and correct copies of the same.

These answering defendants admit that on the 17th day of August, 1916, the said Patsy Poff, died testate, a resident of Garvin County, Oklahoma, seized and possessed of said lands, and that thereafter and on September 5th, 1916, petition was filed for the probate of the will of said Patsy Poff, deceased, and that James H. Blundell was the executor named in said will, and that on the 18th day of September, 1916, said will was duly admitted to probate and duly established as and for the last will and testament of the said Patsy Poff, deceased, and that the said James H. Blundell was, in pursuance of law, appointed executor of said will; and that he has ever since said time acted as such executor; and that the copy of said will attached to the said plaintiff's petition, marked Exhibit "C" is a true and correct copy of said will.

These defendants further admit that at the time of the death of said Patsy Poff, deceased, she left surviving her a husband, whose named was David H. Poff, and admit that the said David H. Poff and the said Patsy Poff were duly married as in said petition alleged, and that the said Patsy Poff, and David H. Poff, although separated, were husband and wife at the time of the death of the said Patsy Poff. These defendants for further answer say, that they admit that the estate and property bequeathed to them under said will was of a value far in excess of the sum of $5.00.

For further answer herein these defendants say that they admit that one Katherine Bailey, who claimed to be an heir at law of the said David H. Poff, executed and delivered to the plaintiff herein a [fol. 37] warranty deed, attempting to convey to the said plaintiff all interest that David H. Poff, had in and to lands of the said Patsy Poff, deceased and admit that the copy of the deed attached to the plaintiff's petition is a true and correct copy of same.

These answering defendants say that they deny each and every, all and singular the other affirmative allegations set up and contained in plaintiff's petition and demand strict proof of same.

III

For further answer herein, and by way of defense to the *pa*intiff's petition, these defendants say that said petition upon its face wholly fails to state any cause of action in favor of the plaintiff and against the defendants, and say that if all of the allegations contained in said petition are true that then plaintiff is not entitled to recover herein.

IV

These defendants say that by the last will and testament of the said Patsy Poff, deceased, they acquired the simple title to the lands in plaintiff's petition described, to the exclusion of the plaintiff and all persons claiming by, thru, or under the said David H. Poff, deceased, and they here and now specially plead said will and the complete probate thereof, as a defense, to the alleged cause of action relied upon by the plaintiff, and they here and now refer to and make a part of this answer all of the proceedings in the County Court of Garvin County, Oklahoma, in cause No. 1138 pertaining to the probate of the will of said Patsy Poff, deceased, part of this answer, the same as though*t* such proceedings and each of them were [fol. 38] set out herein verbatum.

V

For further answer if need be, these defendants say that Section 8341 of the Revised Laws of 1910, of the State of Oklahoma, specifically p-ead by the plaintiff in the first paragraph of his petition does not apply or control or in any way affect the right of a citizen of the Five Civilized Tribes to dispose of the lands allott*t*ed to them by will, but that the Act of Congress of April 26, 1906, being Section 23, and the amendments to such Act of Cong*t*ess, as is contained in the Act of July 27, 1908, control the right of the said Patsy Poff to dispose of said lands by will and in so far as said Section 8341 is any way conflicts with the said Act of Congress, such Act is void and cannot be enforced; that the said David H. Poff, his heirs and assigns, and the said plaintiff herein, who claims to hold some right in and to said lands by reason of the conveyances plead, have acquired no interest whatever in the lands of which said Patsy Poff died seized, and that such conveyances are ineffective and void.

VI

For further and separate answer to paragraph two of the plaintiff's petition, these defendants make all of the above and foregoing answer part of this and answer to Count Two of plaintiff's petition and say in addition thereto that said Count*y* Two does not alleg*ed* and state any cause of action in favor of the plaintiff and against defendants.

VII

For answer to Count Three of the Plaintiff's petition defendants [fol. 39] say that they make all of the allegations contained in this their answer a part of this answer to Count Three of the said petition and in addition thereto they say that said County Three of said Petition of the plaintiff wholly fails to state a cause of action in favor of the plaintiff and against these defendants.

Wherefore, These defendants say that the said plaintiff herein is claiming some right title, interest and estate in and to said lands by reason of the deed under which he holds, and by reason of certain oil and gas lease made to him by the heirs of the said David H. Poff, deceased, but that such claims so asserted under said instruments is void, does not in law create any legal interest in said lands, but that the taking of said deed and oil leases and the conveyances so held by the said plaintiff casts a cloud upon the title of these defendants to said land and prevents these defendants from using and disposing of said lands, and constitutes a cloud on defendants title, and that said instruments of conveyance so made to the said plaintiff herein should be by judgment of this court cancelled, set aside, and held for naught, and the said W. R. Wallace and all person claiming by thru or under him should by *by* judgment of this court forever barred and precluded from setting up or claiming any right, title, interest or estate in and to said lands, or any part thereof, adverse to the title acquired by these defendants under said will, and these defendants are entitled to recover their costs herein.

Bond, Melton & Melton, Counsel for Defendants Oleta Blundell, Juanita Blundell, and James H. Blundell, Their Legal Guardian, and Adrian Melton, Guardian ad Litem.

[fol. 40] In the District Court of Garvin County

[Title omitted]

Separate Answer of James H. Blundell, Executor of the Last Will and Testament of Patsy Poff, Deceased

Comes now James H. Blundell, executor of the last will and testament of Patsy Poff, deceased, and for his separate answer herein hereby adopts and makes a part of his answer all of the allegations set up and contained in the answer of his co-defendants herein, Juanita Blundell and Oleta Blundell, and says that he specifically pleads such answer as his defense herein.

II

For further answer herein this defendant James H. Blundell, executor, says that he admits that he was appointed executor of the

said will and as such he has administered upon such estate; that he has collected the rents and revenues arising from said land, and that he has filed his final report as such executor in the office of the County Court of Garvin County, Oklahoma, that such report so filed by him is true and correct, and that the possession of the lands in said will described have been delivered to said minors. He admits that all of the claims against the estate of the said Party Poff have been paid, as is shown in his final report, and that the same were paid by this defendant from the proceeds arising from the rents [fols. 41-46] and revenues of the lands described in said will, and says that said plaintiff alleges no cause of action against this defendant herein.

III

For further answer herein if need be, this defendant says that the said petition of plaintiff herein filed and especially Co-nt Three and Count Four of said petition allege no cause of action in favor of the plaintiff and against this defendant.

Wherefore, defendant having fully answered prays that the plaintiff take nothing by reason of this action and that he be discharged with his costs herein.

Bond, Melton & Melton, Counsel for Defendant James H. Blundell, Executor.

[fol. 47] IN THE DISTRICT COURT OF GARVIN COUNTY

[Title omitted]

AGREEMENT OF FACTS—Filed January 31, 1921

It is hereby agreed by and between counsel for plaintiff and counsel for defendants in the above styled and entitled case that this cause may be tried upon the following agreed statement of facts.

1. That Patsy Poff was a member of the Choctaw tribe of Indians of the one-half blood enrolled opposite No. 315, and that as such, there was allotted and patented to her the following described lands, to-wit:

The N. E. 4 of N. E. 4 of S. E. 4 of Sec. 12, township 1 north, range four west, and the W. 2 of N. E. 4 of S. W. 4, and lots 6 and 7, and the S. E. 4 of S. W. 4 of Sec. 6, and the west 19.21 acres of lot one, section seven, township one north, range three west.

2. That on the 17th day of August, 1916, the said Patsy Poff died testate, and at the time of her death, she was a resident of Garvin County, Oklahoma, and that she was seized and possessed of the lands hereinabove described at the time of her death; than on the

5th day of September, 1916, petition was, filed in the County Court by James H. Blundell, seeking to probate an instrument therein pro-
[fol. 48] pounded as and for the last will and testament of the said Patsy Poff, deceased; that the copy of the will attached to plaintiff's petition, marked Exhibit "C" is a true and correct copy of said will, and that on the 18th day of September, 1916, said will was duly admitted to probate as and for the last will and testament of said Patsy Poff deceased; that the said James H. Blundell, was duly appointed executor of said will.

3. That at the time of the death of the said Patsy Poff, deceased, she left surviving her a husband whose name was David H. Poff, and that they were married prior to the year 1898, and at the time of the death of the said Patsy Poff, deceased, she and the said David H. Poff were legally husband and wife; that the sum of $5.00 as bequeathed to David H. Poff under the terms of said will did not amount to one-third of the property of which the said Patsy Poff died seized at the time of her death, but that the estate of the said Patsy Poff amounted to several thousand dollars.

4. That in the year 1918, the said David H. Poff, died a resident of Oklahoma County, Oklahoma; that Katherine Baily was duly appointed administratrix of his estate with will annexed; that the said Katherine Bailey was the sole devise- under said will, and was possessed of all the property owned and held by said David H. Poff at the time of his death.

5. That the said Katherine Bailey executed to the plaintiff her warranty deed to the lands described in plaintiff's petition.

6. That ever since the death of the said Patsy Poff, and since the appointment of the said James H. Blundell as executor of said will, the said James H. Blundell as executor has had possession of the lands involved in thos action that Oleta Blundell and Juanita Blundell are claiming to own said lands by virtue of said will; that the said Patsy Blundell has no interest in said lands, nor does she claim any interest therein; that the only interest claimed by James H. Blundell is by virtue of his having been appointed executor of said estate under the will.

[fol. 49] 7. That the said Oleta Blundell and Juanita Blundell as the owners of said land are now in the possession of the same, and holding the same to the exclusion of the plaintiff; that the said James H. Blundell has been in possession of said lands since the date of the death of said Patsy Poff as executor of the will of Patsy Poff, deceased, and as guardian of Oleta Blundell and Juanita Blundell.

Blanton, Andrews and Osborne, Attorneys for Plaintiff.
Adrian Melton, Attorney for Defendants.

[fol. 50] IN THE DISTRICT COURT FOR GARVIN COUNTY

[Title omitted]

JUDGMENT—Filed January 31, 1921

On this the 31st day of January, 1921, the same being one of the regular days of this Court, the above cause came on for hearing, and the plaintiff appears in person and by his counsel and the defendant, James H. Blundell, appeared in person and by his attorneys, and it appraing that defendant, Patsy Blundell has filed a disclaimer herein, the said cause is dismissed as to her, and the defendants, Juanita Blundell and Oleta Blundell appear herein by their guardian ad litem, and counsel, and all persons having announced ready for trial, and a jury being waived, this cause is submitted to the court for judgment.

And the Court after hearing and considering all the evidence in said cause, and after having read the agreed statement of facts herein, and there being no further evidence offered by either party, the court finds:

That Patsy Poff was a member of the Choctaw Tribe of Indians of the one half blood enrolled opposite No. 315, and that as such there was allotted and patented to her the following described lands, to-wit:

The Northeast Quarter of the Northeast Quarter of the Southeast Quarter of Section 12, Township 1 North, Range 4 West, in Stephens [fol. 51] County, Oklahoma, being a portion of her allotment other than a homestead.

The West Half of the Northeast Quarter of the Southwest Quarter; Lots 6 and 7 and the Southeast Quarter of the Southwest Quarter of Section 6, and the West 19.20 acres of lot 1 of Section 7, all in Township 1 North, Range 3 West, in Garvin County, Oklahoma, said lands having been allotted to her as her homestead.

That on the 17th day of August, 1916, the said Patsy Poff, died testate, and at the time of her death she was a resident of Garvin County, Oklahoma, and that she was seized and possessed of the lands hereinabove described at the time of her death; that on the 5th day of September, 1916, petition was filed in the County Court by James H. Blundell, seeking to probate *ab* instrument therein propounded as and for the last will and testament of the said Patsy Poff, deceased; that the copy of the will attached to plaintiff's petition, marked Exhibit "C" is a true and correct copy of said will; and that on the 18th day of September, 1916, said will was duly admitted to probate as and for the last will and testament of said Patsy Poff, deceased; that the said James H. Blundell was duly appointed executor of said will.

That at the time of the death of the said Patsy Poff, deceased, she left surviving her a husband whose name was David H. Poff,

and that they were married prior to the year 1898, and at the time of the death of the said Patsy Poff, deceased, she and the said David H. Poff were legally husband and wife; that the sum of $5.00 as bequeathed to David H. Poff under the terms of said will did not amount to one third of the property of which the said Patsy Poff died seized at the time of her death; but that the estate of the said Patsy Poff amounted to several thousand dollars:

[fol. 52] That in the year 1918, the said David H. Poff, died a resident of Oklahoma County, Oklahoma; that Katherine Bailey was duly appointed administratrix of his estate with will annexed; that the said Katherine Bailey was the sole devise- under said will, and was possessed of all the property owned by and held by the said David H. Poff, at the time of his death:

That the said Katherine Bailey executed to the plaintiff her warranty deed to the lands described in plaintiff's petition.

That ever since the death of the said Patsy Poff, and since the appointment of the said James H. Blundell, as executor of said will and the said James H. Blundell as such executor has had possession of the lands involved in this action; that Oleta Blundell and Juanita Blundell are claiming to own said lands by virtue of said will; that the said Patsy Blundell has no interest in said lands, nor does she claim any interest therein under said will; that the only interest claimed by James H. Blundell is by virtue of his having been appointed executor of said estate under the will.

That the said Oleta Blundell and Juanita Blundell as the owners of said land are now in the possession of the same, and holding the same to the exclusion of the plaintiff; that the said James H. Blundell has been in possession of said lands since the date of the death of said Patsy Poff as executor of the will of Patsy Poff, deceased, and as guardian of Oleta Blundell and Juanita Blundell.

[fol. 53] From the above finding of fact, it is hereby ordered, adjudged and decreed by the Court that the plaintiff herein, W. R. Wallace, is entitled to recover in this action as prayed for in his petition, and that the will of Patsy Poff, deceased attached to plaintiff's petition herein, and filed for probate in the County Court of Garvin County, Oklahoma, on the 18th day of September, 1916, be, and the same is hereby declared to be void in so far as the same pertains to the interest of the plaintiff herein, to all of which the said defendants, and each of them except and which exceptions are by the Court allowed.

It is further ordered, adjudged and decreed by the Court that the plaintiff herein do have and recover, and is hereby vested with the undivided one third interest in and to the above described real property and premises, and the title of plaintiff in and to an undivided one third interest in said real property and premises above described is hereby forever quieted and settled in the plaintiff as against all claims of the defendants, and each of them, and that the plaintiff do have and recover an undivided one third interest in all the other property of which the said Patsy Poff, may have died seized.

It is further ordered, adjudged and decreed by the Court that this action be, and the same is hereby dismissed as to the defendant, Patsy Poff, she having filed her disclaimer herein.

It is further ordered, adjudged and decreed by the Court that the said defendants, jointly with the plaintiff hold the fee title to said lands and that the said plaintiff herein has an undivided one third interest in said lands, and the defendants Juanita Blundell and Oleta Blundell, are the owners jointly with the plaintiff of the other undivided two thirds interest therein, each owning an undivided one third interest there, and that said lands are suceptible of partition and that three disinterested commissioners, to-wit: Walter L. [fol. 54] Hart, H. A. Gage and W. R. Bell be, and they are hereby appointed and designated by this Court to view said property and parti-on the same between the owners hereof share and share alike, and in the event said Commissioners should find that said property cannot be partitioned that they so find, and file a report in said Court showing such fact and return an appraisement of said property as provided by law.

It is further ordered, adjudged and decreed by the Court that the plaintiff do have and recover of and from the defendant possession of an undivided one third interest in and to the above described lands and premises.

It is further ordered, adjudged and decreed by the Court that the question of rents involved in this action, be and the same is hereby continued in this Court pending further action herein.

To all of which judgment, the defendants and each of them except, and their exceptions are by the Court allowed, and notice of appeal in this case is hereby given in open court, and same is now entered on the trial docket, to the plaintiff in this cause, and upon good cause shown the time in which the defendants shall have to serve case made herein, is by the court extended for a period of 30 days from this date, 5 days, thereafter is given in which to suggest amendments and such case may be settled and signed on three days' notice by either party.

It is further ordered, adjudged and decreed by the Court that the judgment herein be, and the same is hereby superseded for a period of ten days from this date upon the filing by the defendants herein of a good and sufficient supersedeas bond in the sum of $1,000.00 conditioned, as provided by law, and upon the filing of said bond the judgment herein shall be superseded pending a decision hereof by the Supreme Court of the State of Oklahoma.

[fols. 55-67] W. L. Eagleton, Judge of the District Court.

O. K. Blanton, Andrews & Osborn, Attys. for Plaintiff.
O. K. B. M. & M.

[File endorsement omitted.]

[fol. 68] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

JUDGMENT—October 9th, 1923

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed.

Opinion by Branson, J.

Johnson, CJ., Harrison, Kane, Nicholson, Kennamer, and McNeill. JJ., concur.

Cochran, J., dissents.

[fol. 69] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

OPINION—Filed October 9, 1923

Syllabus

1. The Act of congress of April 26, 1906, entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes," provides in section 23:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein, provided that no will of a fullblood Indian should be valid if such last will and testament disinherits the parent, wife, spouse, or children of such fullblood Indian, unless acknowledged before and approved by a Judge of the United States Court for the Indian Territory, or a United States Commissioner."

This provision of the act of congress had for its purpose the further removal of restrictions from citizens of the Five Civilized [fol. 70] Tribes of Indians, and was not intended by congress as conferring an absolute right of disposition of his property without regard to the law of the State where the property is located.

2. Section 8341, R. L. Okla. 1910 provides:

"Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed, may be dis-

posed of by will; Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband; Provided, further, that no person who is prevented by law from alienating, conveying or encumbering real property while living shall be allowed to bequeath same by will."

Held: This provision is applicable to Indian citizens, as well as other citizens of the state.

3. Record examined, and held that the testatrix, Patsy Poff, could not convey her real estate allotted to her as a citizen of the Choctaw Nation by will executed in 1916, free — the provisions of section 8341, R. L. 1910.

[fol. 71] Opinion

By Branson, J: This appeal is prosecuted to reverse a judgment obtained by the defendant in error against the plaintiffs in error in the district court of Garvin County, Oklahoma. The parties are referred to herein as they appeared in the lower court. The facts controlling the determination of the issues raised by the pleadings were stipulated, and were in substance, that Patsy Poff was a member of the Choctaw tribe of Indians of one-half degree of blood, and that she was allotted the land in question, to-wit, the homestead, and 10 acres of the surplus allotment as a citizen of the Choctaw nation, and died seized thereof, on the 7th day of August, 1916, a resident of Garvin County. That the said Patsy Poff left surviving her husband, David H. Poff, and that prior to her death, she had executed a will devising her said homestead and 10 acres of surplus to the defendants. That said will bequeathed to David H. Poff the sum of $5.60, which did not amount to one-third of the property of which the said Patsy Poff died seized, the said estate of the said Patsy Poff being worth several thousand dollars.

Judgment for one-third of the land was entered in favor of plaintiffs, following the state statute.

From the judgment of the district court the plaintiffs in error appeal, and make various assignments. The only assignment necessary to be discussed, however, as we view the case are assignments 2, 3 and 4, which are:

"2. The said District Court of Garvin County, erred in holding as a matter of law that the rights of the plaintiff in error's decedent, Patsy Poff to make a will was controlled by Section 8341, R. L. 1910.

[fol. 72] "3. The said District Court of Garvin County, erred in holding that the will executed by the said Patsy Poff deceased, was not sufficient to convey and vest the fee title in the lands therein described to the said beneficiaries under said will.

"4. The said District Court of Garvin County erred in holding that the defendant in error's decedent, David H. Poff, husband of Patsy

Poff, deceased, was entitled to recover any interest in said land divested under the terms of said will."

The question of law involved in this appeal is whether or not the limitations contained in section 8341 R. L. 1910 controlled. It must be borne in mind that the testator in this case was a half blood citizen of the Choctaw nation, that the lands sought to be devised consisted of her homestead and 10 acres of her surplus, allotted to her by reason of her citizenship in the Choctaw Nation, that this property was worth several thousand dollars; and that all of her property except the sum of $5.00 was bequeathed to persons other than her husband.

The plaintiff, W. R. Wallace, claimed a one-third interest in the lands, so devised, through mesne conveyances passing the interest of David H. Poff, husband of the said testatrix, Patsy Poff. The defendants contend that section 23 of the act of congress of April 26, 1906, gave the allottee power to dispose of her property by will free from any limitation imposed by the statutes of the State of Oklahoma. Said section 23 is:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his real estate and personal property and all interest therein, provided that no will of a fullblood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse or child of such fullblood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner."

[fol. 73] Said section was modified by the act of May 27, 1908, by adding at the conclusion thereof, "Or a judge of a county court of the State of Oklahoma." The said statute which the trial court held was controlling is section 11224, Compiled Statutes of Oklahoma of 1921 (Sec. 8341 R. L. Okla. 1910) which section provides:

"Every estate and interest in real or personal property to which heirs, husband, widow or next of kin might succeed, may be disposed of by will: Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband; Provided further, that no person who is prevented by law from alienating conveying or incumbering real property while living shall be allowed to bequeath same by will."

The defendants rely for reversal of this cause on their contention that the said section 23 of the act of congress gives the allottee to whom said act referred the right and power to devise and bequeath all of his property, and that a limitation cannot be placed upon said right by the said section of the state statute; that said sections cannot be construed together; that they are in conflict, and that congress had the power to regulate the disposition of allotments of

citizens of the Five Civilized Tribes. If these statutes are in conflict, then of course the act of congress must prevail, and the judgment of the trial court be reversed.

In determining whether or not they are in conflict, the question is, what was the intent and purpose of congress in passing said section 23? Did it give a right to the Indian, or merely remove a restriction existing? To determine this intent, we must necessarily look to the conditions as to which congress was legislating, and take into consideration its various acts in pari materia. In looking to the different acts of congress, we do not feel that it is necessary to quote at [fol. 74] length therefrom, or to refer in detail to the different provisions of the numerous acts from 1893 down to 1908, touching the allotments of the lands theretofore held in common by the citizenship of these several tribes known as the Five Civilized Tribes, and constituting the bulk of that part of Oklahoma which prior to its admission as a state, on November 16, 1907, was the Indian Territory. The various acts and treaties set forth in detail the purpose and object of congress was to divest the tribes of their interest in the lands owned by them, and to vest the same in the citizens legally entitled to enrollment, each of the acts carrying with it an inhibition against alienation by the Indian citizens of the lands so received, in the exercise of the plenary power of the congress of the United States, as guardian of the Indians, and the properties owned by them. The act of congress of July 1, 1902, known as the Supplemental Agreement with the Choctaws and the Chickasaws, out of which the title to the land involved in this controversy arose, provided for the allotment to each citizen of the tribe, a certain amount of land, the acreage thereof to be determined by the character of the land, as disclosed by an appraisement thereof long theretofore made under the supervision of the Government of the United States. The said allotment act specifically provided that a certain portion of the lands to which each citizen was entitled should be known as surplus, and a certain portion homestead. These different designations were useful in the scheme of allotment only insofar as congress put different restrictions and limitations upon the one to the other. Those lands allotted as surplus were made alienable within a certain period of time, while the lands allotted as homestead were not alienable except under certain other conditions expressed in the acts. None of the lands could be disposed of by will until Congress authorized the [fol. 75] same. This authority to dispose of land by will was in the nature of a removal of restrictions theretofore existing against alienation, and not in its nature conferring a right. The said section 23 was the first removal of congress of the restriction theretofore existing against alienation by will in the Choctaw and Chickasaw Nation.

The act of congress of May 2, 1890 extended in force in Indian Territory of which the Choctaw Nation was a part. Chapter 155 of Mansfield's Digest on "Wills and Testaments" Section 2 of the Act of April 28, 1904 (33 Stat. 573) made all the laws of Arkansas theretofore put in force in the Indian Territory, applicable to Indians and their property, where not inconsistent with acts of con-

gress governing the same. One section of said chapter 155 of said Mansfield's Digest on wills and Testaments being section 6500, provided:

"When any person shall make his last will and testament and omit to mention the name of a child, if living, or the legal representatives of such children born and living at the time of the execution of such will, every such person so far as regards such children, shall be deemed to have died intestate, and such children shall be entitled to such proportion, share and divided of the estate, real and personal, of the testator, as if he had died intestate, and such children shall be entitled to recover from the devisees and legatees in proportion to the amount of their respective shares, and the court exercising probate jurisdiction shall have power to decree a distribution of such estate according to the provisions of this and the preceding sections."

In the Creek Nation the act of Congress of June 30 1902 (32 Stat. 503) the same being a part of the Supplemental Creek Agreement, provided:

"The homestead of each citizen shall remain after the death of the allottee for the use of children born to him after May 25, 1901, but [fol. 76] if he have no such issue, then he may dispose of his homestead by will, free from the limitation herein imposed. * * *"

In the case of In re Brown's Estate, or Lynde-Bowman-Darby Co. vs. Brown (Okla.) 97 Pac. 613, this court had under consideration the question as to whether the said limitation of the said chapter 155 Mansfield's Digest on Wills and Testaments hereinabove quoted worked a limitation upon the right of a person who fell within the conditions of the said act of congress giving the right to dispose of the homestead part of the allotment by will. After quoting said provision of Mansfield's Digest and the said provision of the Creek Treaty of 1902, this court said:

"If the laws of Arkansas governing wills and testaments, * * * were not in force in the Creek Nation at the time of descent cast in this case, then there were no written laws governing these subjects, and the Act of Congress of May 2, 1890 supra being in force, chapter 155 supra * * * would be abortive. Such was not the intention of Congress, and the courts heretofore construing these laws have not so construed them. * * * As in this case there were no children born to the devisee. After May 25, 1901 there was no reason why she should not dispose of the land embraced in her homestead by will, but in doing so, it was incumbent upon her to make provision therein for any surviving children born prior to the 25th day of May, 1901. Failing to do so, she must be deemed to have died intestate, and such surviving child is entitled to such a proportion, share and dividend, real and personal, of the estate, as if no will had been made. To determine such share, resort must again be had to the laws of Arkansas * * *."

In the syllabus in said case, the court said:

"There being no children born to a citizen Creek allottee after the 25th day of May, 1901, she was entitled to dispose of her home-[fol. 77] stead by will, and such devise was subject to the limitations contained in section 6500 of Mansfield's Digest, which reads: 'When any person shall make his last will and testament, and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, every such person so far as regards such child, shall be deemed to have died intestate, and such child shall be entitled to such proportion, share and dividend of the estate, real and personal, of the testator as if he had died intestate; and such child shall be entitled to recover from the devisees and legatees in proportion to the amount of their respective shares, and the court exercising probate jurisdiction shall have power to decree a distribution of such estate according to the provisions of this and the preceding sections.'"

Thus the court held that although the act of congress known as the Supplemental Creek Treaty expressly authorized citizens under the condition that no child was born after May 25, 1901, and living, to dispose of the homestead by will, that the Arkansas statute placing a limitation thereon was applicable to the Indian citizen. (See also Taylor vs. Parker (Okla.) 125 Pac., 573, 59 L. Ed., 121.)

The said authorities drive us to the conclusion that as long as the statutes of Arkansas placed in force in the Indian Territory on wills and testaments remain the law of that jurisdiction, that wherever property belonging to an Indian citizen by reason of his allotment was alienable by will, the disposition thereof by the Indian citizen by his last will and testament was in accordance with the provisions of Mansfield's Digest, and the limitations contained therein.

In the case of Jefferson v. Fink, 247 U. S. 288, in referring to the various acts of congress touching the allotment of lands in the Five Civilized Tribes, the Supreme Court, among other things, said:

[fol. 78] "Congress was then contemplating the early inclusion of that territory in the new state, and the purpose of those acts was to provide for the time being a body of laws adapted to the needs of the locality and its people, in respect to matters of local or domestic concern. There being no local legislature, congress alone could act. Plainly its action was intended to be merely provisional. By the Enabling Act of June 16, 1906 (34 Stat. 267) provision was made for admitting into the Union both the territory of Oklahoma and the Indian Territory as the State of Oklahoma. Each territory had a distinct body of local laws. Those in the Indian Territory, as we have seen, had been put in force there by Congress. Those in the Territory of Oklahoma had been enacted by the Territorial Legislature. Deeming it better that the new state should come into the Union with a body of laws applying with practical uniformity throughout the state, Congress provided in the Enabling Act, (Sec. 13) that 'the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the legislature

thereof,' and also Sec. 21) that 'all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the constitution of the state.' The people of the state, taking the same view, provided in their constitution (Art. 25 Sec. 2) that 'all laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law.'

"The state was admitted into the Union November 16, 1907; and thereupon the laws of the Territory of Oklahoma relating to descent [fol. 79] and distribution (Rev. Stat. Okla. 1903, c. 86, Art. 4) became laws of the state. Thereafter Congress, by Act of May 27, 1908, c. 199, 35 Stat. 312, Sec. 9, recognized and treated 'the laws of descent and distribution of the State of Oklahoma' as applicable to the lands allotted to members of the Five Civilized Tribes."

The effect of the Enabling Act and the Schedule to the Oklahoma Constitution as touching wills and testaments was merely to substitute the Oklahoma territorial statutes for the laws then in force in the Indian Territory. The policy of Congress at all times touching Indian affairs was to place the Indian as far as practicable and beneficial to the Indian, on the same footing as other citizens of the community or state in which the Indian resides, and this construction will be given to the acts of Congress unless the contrary intention appears. In making the allotments to the citizens of the Five Civilized Tribes, different restrictions and provisions governed the surplus, homestead and inherited lands. In enacting section 23, which had for its purpose a further removal of restrictions, Congress was not unmindful of the fact of those varying legal provisions as affecting the real estate held by the Indians, and by the use of the language of section 23, undertook to make it clear that the Indian citizen could dispose by will of all of his property, and not that arising from some particular source. In other words, Congress merely authorized the Indian to dispose of his estate on the same footing as any other citizen, with the limitation contained in the proviso thereto. There is nothing in the language of section 23 which, if the will had been made, and testator died after said act and before statehood, would not have made the same subject to the provision of the Arkansas statute [fols. 80-93] in force in the Indian Territory, as held to be applicable in the cases above set out. The Oklahoma statute being merely a substitution for the Arkansas law, there is no potent reason advanced, and we think none exists, why the limitations imposed by the Oklahoma Statute above quoted, should not prevent an Indian from disposing of his property by will, to the exclusion of the husband or the wife.

The case cited by plaintiff in error, Blanset v. Cardin et al., 261 Fed. 309, construed an act of Congress touching the alienation by will of allotments held under trust or patent, by the Government for the benefit of certain Quapaw Indians, which act of Congress gave the

Secretary of the Interior complete power to approve or disapprove such will. We do not think that under the facts recited in that case, that the reasoning has any application to the question now before this court for determination.

For the reasons given, the judgment of the district court of Garvin County should be affirmed.

Johnson, C. J., Harrison, Kane, Nicholson, Kennamer, and McNeill, JJ., concur.

Cochran, J., dissents.

[fol. 94] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PRINTED RECORD—Filed February 18, 1924

It is hereby agreed and stipulated by and between counsel for appellants, and counsel for appellee, that the only record necessary to be printed, indexed and filed, and distributed in this cause to determine the issues involved herein are the following instruments, to-wit:

Plaintiff's petition and exhibits attached thereto, appearing at pages 2 to 13 inclusive of case made.

Separate answer of Patsy Blundell, page 21 case made.

Separate answer of Jaunita Blundell and Oleta Blundell, minors, case made, pages 22 to 26 inclusive.

Separate answer of defendant, James H. Blundell, executor of the last will and testament of Patsy Paff, deceased, record pages 27 and 28.

Agreed statement of facts, on which said cause was tried, pages 32½ and 32¾ of the case made filed in the Supreme Court of Oklahoma.

Judgment of the District Court of Garvin County, Oklahoma, as shown by case made, pages 34 to 39 inclusive.

Petition in error.

Opinion of the Supreme Court of the State of Oklahoma.

Petition for writ of error to U. S. Supreme Court.

Writ of errorr.

Assignments of error.

Dated this the 5th day of February, 1924.

Reford Bond, Alger Melton, Adrian Melton, Counsel for Above-named Appellants. Cicero I. Murray (Lindsay, Okla.), Counsel for Above-named Appellee.

[fol. 95] [File endorsement omitted.]

Endorsed on cover: File No. 30,098. Oklahoma Supreme Court. Term No. 788. James H. Blundell, executor of the last will and testament of Patsy Paff, deceased; Jaunita Blundell, Oleta Blundell, et al., etc., plaintiffs in error, vs. William R. Wallace. Filed February 2, 1924. File No. 30,098.

No. [redacted]276

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

JAMES H. BLUNDELL, EXECUTOR OF THE LAST WILL AND TESTAMENT OF PATSY POFF, DECEASED, JAUNITA BLUNDELL, OLETA BLUNDELL AND PATSY BLUNDELL, MINORS, JAMES H. BLUNDELL, LEGAL GUARDIAN OF SAID MINORS, APPELLANTS,

VS.

W. R. WALLACE, APPELLEE.

BRIEF OF COUNSEL FOR APPELLANTS.

BOND, MELTON & MELTON,
Attorneys for Appellants.

INDEX.

EXPLANATION.—The question involved in this case could have been presented under one proposition or assignment of error. We have presented it under three assignments of error rather than under three propositions.

No. 788.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

JAMES H. BLUNDELL, EXECUTOR OF THE LAST WILL AND TESTAMENT OF PATSY POFF, DECEASED, JAUNITA BLUNDELL, OLETA BLUNDELL AND PATSY BLUNDELL, MINORS, JAMES H. BLUNDELL, LEGAL GUARDIAN OF SAID MINORS, APPELLANTS,

VS.

W. R. WALLACE, APPELLEE.

STATEMENT OF THE CASE.

The appellants are grandchildren and devisees of Patsy Poff, a Choctaw Indian of the half blood, who devised them a part of her allotment selection and bequeathed the sum of $5.00 to her husband, David H. Poff. The executrix died on the 7th day of August, 1916, in Garvin County, Oklahoma.

The appellee is a grantee of Katherine Bailey, a devisee of said David H. Poff, who devised to said

Katherine Bailey a one-third interest in and to said part of the allotment selection of his wife Patsy Poff. Said executor died in the year of 1918 in Oklahoma County, Oklahoma.

Patsy Poff devised a part of her allotment selection to her grandchildren, contending that Section 23 of the Act of Congress of April 26, 1906, gave her the right to dispose of said part of her allotment selection by will without limitation as to the amount devised and without restriction as to devisees.

David H. Poff devised a one-third interest in and to said land to Katherine Bailey, sole devisee under the will contending that under Section 8341 R. L. Okla. 1910, his wife, Patsy Poff, could not bequeath more than two-thirds of her property away from her husband. That she could not by will preclude him from a one-third interest in and to her estate.

This case was tried in the District Court of Garvin County, Oklahoma, upon an agreed statement of fact. The judgment was for the appellee. An appeal was prosecuted to the Supreme Court of the State of Oklahoma. The judgment of the trial court was affirmed. The case comes to this court on a writ of error from the Supreme Court of the State of Oklahoma.

STATEMENT OF FACTS.

There can be no controversy as to the facts involved as the case was tried upon an agreed statement of fact. The same is set out below in full.

> "The Northeast quarter of the Northeast quarter of the Southeast quarter of section 12, Township 1, North, Range 4 West, and the West half of the Northeast quarter of the Southwest quarter of lots 6 and 7 and the Southeast quarter of the Southwest quarter of section 6, and the West 19.20 acres of lot one, section 7, Township 1 North, Range 3 West.
>
> "2. That on the 7th day of August, 1916, the said Patsy Poff died testate, and at the time of her death, she was a resident of Garvin County, Oklahoma, and that she was seized and possessed of the lands hereinabove described at the time of her death; that on the 5th day of September, 1916, petition was filed in the County Court by James H. Blundell, seeking to probate an instrument herein propounded as and for the last will and testament of the said Patsy Poff, deceased, that the copy of the will attached to plaintiff's petition, marked Exhibit "C" is a true and correct copy of said will; that on the 18th day of September, 1916, said will was duly admitted to probate as and for the last will and testament of said Patsy Poff, deceased; that the said James H. Blundell was duly appointed executor of said will.
>
> "3. That at the time of the death of the said Patsy Poff, deceased, she left surviving her a husband, whose name was David H. Poff, and that they were married prior to the year 1898, and at the time of the said Patsy Poff, deceased, she and the said David H. Poff were legally husband and

wife; that the sum of $5.00 was bequeathed to David H. Poff under the terms of said will did not amount to one-third of the property of which the said Patsy Poff died seized at the time of her death, but that the estate of the said Patsy Poff amounted to several thousand dollars.

"4. That in the year 1918, the said David H. Poff died a resident of Oklahoma County, Oklahoma; that Katherine Bailey was duly appointed administratrix of his estate with annexed; that the said Katherine Bailey was the sole devisee under said will, and was possessed of all the property owned and held by the said David H. Poff at the time of his death.

"5. That the said Katherine Bailey executed to the plaintiff her warranty deed to the lands described in plaintiff's petition.

"6. That ever since the death of the said Patsy Poff and since the appointment of the said James H. Blundell as executor of said will, the said James H. Blundell as executor has had possession of the lands involved in this action, that Oleta Blundell and Jaunita Blundell are claiming to own said lands by virtue of said will; that the said Patsy Blundell has no interest in said lands, nor does she claim any interest therein; that the only interest claimed by James H. Blundell is by virtue of his having been appointed executor of said estate under the will.

"7. That the said Oleta Blundell and Jaunita Blundell as the owners of said land are now in the possession of the same, and holding the same to the exclusion of the plaintiff; that the said James H. Blundell has been in possession of said lands since the date of the death of the said Patsy Poff as executor of the will of Patsy Poff, deceased, and as guardian of Oleta Blundell and Jaunita Blundell."

ASSIGNMENTS OF ERROR.

1. The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Garvin County, State of Oklahoma.

2. The Supreme Court of the State of Oklahoma erred in not reversing the judgment of the District Court of Garvin County, State of Oklahoma.

3. The Supreme Court of the State of Oklahoma erred in holding that Section 8341 of the Revised Laws of 1910 of the State of Oklahoma was not in conflict with an Act of Congress of the United States of April 26, 1906, entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes."

4. The Supreme Court of the State of Oklahoma erred in holding that the will of Patsy Poff, deceased, was invalid and not sufficient in law to divest David H. Poff, the remote grantor of the defendant in error, William R. Wallace, from all right, title and interest in the lands described in said will of the said Patsy Poff, deceased.

5. The Supreme Court of the State of Oklahoma erred in holding that under the Act of Congress of April 26, 1906, the said Patsy Poff, a member of the Choctaw Tribe of Indians could not under the Act of Congress make a will of her lands that by its terms devised all of her real estate to persons other than her husband, David Poff, as provided by Section 8341 of the Revised Laws of 1910, or the State of Oklahoma.

ARGUMENT AND AUTHORITY.

Briefly and succinctly stated the following is the legal question presented by this appeal:

Under the Federal law can a Choctaw Indian woman of the one-half blood, duly enrolled and recognized as such devise all of her estate, real and personal, save the sum of five dollars, to her grandchildren, regardless of a state statute which provides that a married woman cannot will more than two-thirds of her property away from her husband.

We rely upon assignments of error 3-4 and 5.

ASSIGNMENT OF ERROR No. 3.

The Supreme Court of the State of Oklahoma, erred in holding that Section 8341 of the Revised Laws of 1910 of the State of Oklahoma, was not in conflict with the Act of Congress of the United States of April 26, 1906, entitled "an act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes."

Argument and Authority Under Assignment No. 3.

We have but to compare the two acts to note the marked conflict. The Oklahoma statute contains a clear and direct inhibition against the right of a woman while married to bequeath more than two-thirds of her property away from her husband.

The Federal statute confers the right to devise without restriction or limitation save as to age, condition of mind and degree of blood. The testatrix was of lawful age, sound mind and an Indian of the half blood. Therefore she could devise and bequeath all of her estate, real and personal and all interest therein without limitation as to portion of property to be devised and without restriction as to the devisees to be selected.

Congress conferred the right on the Indian to devise without restriction as to devisees with the intent of preventing mercenary intermarriages and for the purpose of protecting the Indians in their property rights.

Section 23 of the Act of April 26, 1906, provides:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse or children of such full blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory or a United States Commissioner."

Section 8341, R. L. Okla. 1910, provides:

> "Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will: Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband; provided

> further, that no person who is prevented by law from alienating, conveying or encumbering real property while living shall be allowed to bequeath same by will."

A strong evidence of intent and purpose of the Legislature was the enactment by Congress after the advent of statehood in Oklahoma of Section 8 of the Act of Congress of May 27, 1908, which is as follows:

> "Section 8. That section twenty-three of an act entitled 'An Act to provide for the final dispositions of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes,' approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of section the words, 'or a Judge of a County Court of the State of Oklahoma.' "

Congress when passing this amendment to Section 23 of the Act of Congress of April 26, 1906, made but one modification thereof, and that was concerning the acknowledgment and approval of wills of a full blood Indian. The fact is very compelling and persuasive that Congress failed to repeal that part of Section 23 conferring the right to will without restriction or limitation and failed to provide that the law of wills of the State of Oklahoma should control. It is significant that Congress provided that in case a full blood Indian should disinherit a parent, wife, spouse or child, Section 23 should be amended by adding at the end of said section the words, "Or Judge of a County Court of the State of Oklahoma," and did not at the same time provide that the law of wills of the State of Oklahoma should apply to all allottees of the Five Civilized Tribes.

The proviso contained in Section 23 of the Act of Congress of April 26, 1906, provides the manner in which the right to disinherit a parent, wife, spouse or child may be exercised by full blood Indians. The proviso in question conferred no right to devise, it simply provided for a procedure to be followed by full bloods who wished to disinherit a parent, a wife, a spouse or children, therefore it cannot be said that Congress granted the full blood the right to disinherit but withheld that right from the half blood. The enacting clause conferred the right regardless of the degree of blood.

Congress has the power to confer the right of disposition by will on Indian Wards without limitation as to portions to be devised and without restriction as to devisees to be selected and such right cannot be limited or impaired by state statutes. Therefore as there is a conflict between the Federal and the state statutes involved the Federal statute is supreme and controls.

The case of *Eli Bunch* v. *J. B. Cole et al.*, is reported in the United States Supreme Court Advanced Opinion for December 15, 1923, at page 130. The first syllabus of said case is as follows:

> "1. Congress may impose restrictions on the right of Indian wards to alien or lease lands allotted to them in the division of the lands of their Tribe which cannot be impaired by state statutes."

In the Cole case, *supra*, Mr. Justice Van Devanter in delivering the opinion of the court used the following language:

"The power of Congress to impose restrictions on the rights of Indian wards of the United States to alien or lease lands allotted to them in the division of the lands of their tribe is beyond question; and of course is not competent for a state to enact or give effect to a local statute which disregards these restrictions or thwarts their purpose. *Marchie Tiger* v. *Western Inv. Co.*, 221 U. S. 286, 316, 55 L. Ed. 738, 749, 31 Sup. Ct. Rep. 578; *Monson* v. *Simonson*, 231 U. S. 88, 96, 62 L. Ed. 260, 262, 34 Sup. Ct. Rep. 285; *Mullen* v. *Pickens*, 250 U. S. 590, 595, 63 L. Ed. 1158, 1161, 40 Sup. Ct. Rep. 31."

ASSIGNMENT OF ERROR No. 4.

The Supreme Court of the State of Oklahoma erred in holding that the will of Patsy Poff, deceased, was invalid and not sufficient in law to divest David Poff, the remote grantor of the defendant in error, William R. Wallace from all right, title and interest in the lands described in said will of the said Patsy Poff, deceased.

Argument and Authority Under Assignment No. 4.

The lower court held that the will of Patsy Poff was not sufficient in law for the reason that the Act of Congress of April 26, 1906, was merely in the nature of a removal of restrictions on alienation by will and conferred no right to alienate by will without limitation as to portions devised and without restrictions as to the devisees to be selected.

The court in holding that the authority to dispose of land by will was in the nature of a removal of restrictions against alienation and was not intended to confer an absolute right of disposition by will, without re-

gard to state laws, overlooked and failed to consider the proviso, to-wit:

"Provided that no will of a full blood Indian devising real estate shall be valid if such last will and testament disinherits the parent, wife, spouse, or child of such full blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory or a United States Commissioner." And the well established rules of statutory construction with reference to provisos.

In passing said Act, Congress was legislating for the Indians, it not only had for its purpose the removal of restrictions, but it also intended to grant the right to dispose of property by will without limitation as to portions of property to be devised or as to the devisees to be selected. Congress said to this testator and to all other Indians of lawful age and sound mind that thereafter as to their lands concerning which Congress had the right to legislate, the same might be devised by will and that as to the form of will the testator was to be governed by the statute of wills in force in the state at the time of the making thereof, but that as to the substance of the will he was to be controlled by the Act of Congress with reference thereto. According to the terms and provisions of said proviso a full blood Indian could disinherit a parent, wife, spouse or children. If it was the purpose and intent of Congress to allow a full blood Indian to disinherit contrary to the laws of the State of Oklahoma, a wife or spouse; then there is a conflict between the

Federal statute and the state statute with reference to the law of wills.

If under the terms of the proviso a full blood Indian could disinherit a wife or spouse against the express provisions of Oklahoma Law, under what Act of Congress was that power and authority conferred? It was conferred by the enacting clause which provides that "every person of lawful age and sound mind, may by last will and testament devise and bequeath all of his estate real and personal and all interest therein." The proviso was simply a restraint or condition placed upon the enacting clause, it restrained full blood Indians from disinheriting except in certain cases. It placed no restrictions whatever upon half bloods of lawful age and sound mind.

In construing the above enacting clause and the proviso thereof, the court failed to consider well established and fundamental laws of statutory construction applicable thereto.

> "Provisos and exceptions are similar, intended to restrain the enacting clause, to except something which would otherwise be within it, or in some manner to modify it."
>
> Southerland Statutory Construction, Volume 11, page 670.

> "A proviso is something ingrafted upon a proceeding enactment, and is legitimately used for the purpose of taking special cases out of a general class to guard against misinterpretation."
>
> Southerland Statutory Construction, Vol. 11, page 671.

The misinterpretation of the Federal Statute involved would have been avoided if the court had con-

sidered that the full blood was simply a special class of Indians taken from the general class granted the power to alienate in the enacting clause.

If it had been the purpose and intent of Congress to simply remove restrictions on alienation by will, why did Congress except the full blood by a special proviso and especially provide how the full blood could disinherit a wife, or spouse?

> "Where there is a prohibition, grant or regulation in general words, and the saving of particular things, there is a strong implication that what is excepted, would have been within the purview, if it had not been excepted, and thus the purview may be made more comprehensive than it would otherwise have been."
>
> Southerland Statutory Construction, Vol. 11, page 672.

A careful consideration of the acts and statutes involved is very convincing. The Federal Act confers the right to devise and bequeath without limitation or restriction save as to the proviso with reference to full bloods.

Congress heretofore in the enactment of laws removing restrictions on Indian Wards and their property usually used language clear and unmistakable in its terms, for example such words as these, "the restrictions on alienations are hereby removed."

If it had been the intention of Congress to merely remove the restrictions on alienation by will, it is very probable that language similar to the following would have been used.

"Restrictions on alienation by will are hereby removed and the local law of wills made applicable" but instead Congress used this language:

> "EVERY PERSON OF LAWFUL AGE AND SOUND MIND MAY BY LAST WILL AND TESTAMENT DEVISE AND BEQUEATH ALL OF HIS ESTATE, REAL AND PERSONAL AND ALL INTEREST THEREIN."

If there is any doubt as to the construction to be placed on the Federal statute involved, that doubt should be resolved in favor of the Indian testatrix.

In the case of *Choate et al.* v. *Trapp*, 224 U. S. 665, 56 L. Ed. 491. The second syllabus reads as follows:

> 2. "Any doubt as to whether the tax exemption provision in the act of June 28, 1898, allotting lands in severalty to the members of the Choctaw and Chickasaw tribes, was a personal privilege and repealable, or an incident attached to the lands itself for a limited period, must be resolved in favor of the patentees."

Mr. Justice LaMar in delivering the opinion of the court in the case of *Choate* v. *Trapp*, *supra*, used the following language:

> 6. "But in the government's dealing with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases."

ASSIGNMENT OF ERROR No. 5.

The Supreme Court of the United States erred in holding that under the Act of Congress April 26, 1906, the said Patsy Poff, a member of the Choctaw Tribe of Indians could not under Act of Congress make a will of her lands that by its terms devised all of her real estate to persons other than her husband, David Poff, as provided by Section 8341 of the Revised Laws of 1910, of the State of Oklahoma.

Argument and Authority Under Assignment No. 5.

The Supreme Court of our state has held that the phrase "prevented by law" as used in the statutes of Oklahoma heretofore set out means, prevented by law, of the state, and does not apply to Indians of the Five Civilized Tribes.

In the case of *Walker* v. *Brown*, 43 Okla. 144, the second syllabus reads as follows:

> 2. *Same.*—Alienation of land—"Prevented By Law." The phrase, "prevented by law," as used in that part of Section 8341, Rev. Laws 1910, which provides "No person who is prevented by law from alienating, conveying or incumbering real property while living shall be allowed to bequeath same by will," means prevented by law of the state, and does not apply to the Indians of the Five Civilized Tribes who are prevented by the Act of Congress from alienating, conveying or incumbering real property while living, otherwise than by last will and testament.

The second syllabus of the case of *In re: Allen's Will*, 44 Okla. page 392, reads as follows:

> 2. *Wills*—Power to Bequeath property—Indians—*"Prevented by Law."* The phrase "Pre-

> vented by law," as used in that part of Section 8341, Rev. laws 1910, which provides, "No person who is prevented by law from alienating, conveying or incumbering real property while living shall be allowed to bequeath same by will," means prevented by law of the State, and does not apply to Indians of the Five Civilized Tribes, who are prevented by Act of Congres from alienating, conveying, or incumbering real property while living, otherwise than by last will and testament.

The syllabus of the case of *Brock* v. *Keifer*, 59 Okla. page 5 may be *obiter dictum*, but it is very apropos and therefore we quote said syllabus:

> "6. The proviso of Section 8341, Rev. Laws 1910, does not apply to wills executed by members of the Five Civilized Tribes of Indians devising their allotted lands."

The case of *Blanset* v. *Cardin et al.*, reported in 261 Fed. 309, is analogous in many respects to the case at bar. The 3rd syllabus of the case reads as follows:

> "3. Under Act of Congress, Feb. 14, 1913, amending Act June 25, 1910, 2 (Comp. St. 4228) allowing persons interested in allotments held under trust or patent containing restrictions on alienation, to dispose of such property by will, and the regulation thereunder, a will by an Indian married woman, approved by the Secretary of the Interior disposing of all of her allotted lands, is valid, notwithstanding Rev. Laws, Okla., 1910, Art. 8341, PROVIDING THAT NO MARRIED WOMAN SHALL BEQUEATH MORE THAN TWO-THIRDS OF HER PROPERTY AWAY FROM HER HUSBAND, and that no person prevented by law from alienating real property shall be allowed to dispose of the same by will."

We quote from the opinion of the court, pages 311 and 312:

> "The grant of the right to dispose of this property by will is clear and comprehensive, IT CONTAINS NO LIMITATIONS AS TO PORTIONS OF PROPERTY TO BE DEVISED NOR TO THE DEVISEES TO BE SELECTED, nor other restraint upon the exercise of the power, except that the disposal must be in accord with the regulations to be prescribed by the Secretary of the Interior and that the will must be approved by him * * *.
>
> "* * * The general policy of Congress has been to maintain control over the Indians and the disposition of their allotments, according to its ideas of what is beneficial for them, rather than submit them to state laws. CONGRESS WAS WELL ADVISED THAT UNWORTHY AND DESIGNING PERSONS SOMETIMES CONTRACT MARRIAGES WITH INDIANS WITH A VIEW TO OBTAINING THE BENEFIT OF THEIR PROPERTY WHICH THE UNITED STATES HAS GRANTED TO THE INDIANS AND THAT THE RIGHT OF A TESTATOR OR TESTATRIX TO SELECT DEVISEES, AND THE RIGHT OF THE INTERIOR DEPARTMENT TO DISALLOW ANY WILL, WOULD OFTEN AFFORD NEEDED PROTECTION TO DEFENDANT AND NATURAL HEIRS AGAINST THE WASTE OF THE ESTATE AS THE RESULT OF UNFORTUNATE MARRIAGE AND ENFORCED INHERITANCE BY STATE LAWS."

We quote further from the opinion of the court on page 313:

> "4. It is conceded that Congress has the right to pass legislation in the interest of the Indians as a dependent people, and that it may control the disposition of the allotments during the period of restriction on alienation *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; *Heckman* v. *United States*, 224 U. S. 413, 32 Sup. Ct. 242, 56 L. Ed. 820. The conclusion is that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under this act of Congress, free from restrictions on the part of the state as to the portions to be conveyed or as to the object of the testator's bounty provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior. We understand this conclusion is in accord with the views of the Supreme Court of Oklahoma, see *Brock* v. *Keifer*, 157 Pac. 88."

The case of *Blanset* v. *Cardin*, *supra*, was appealed to the Supreme Court of the United States and is reported in 256 U. S. 319 and in 65 L. Ed. 950, the syllabus is as follows:

> "The prohibition of the Oklahoma Code, Section 8341, against the bequest of a married man or woman of more than two-thirds of his or her property away from the other spouse, cannot be invoked to defeat the will of an Indian married woman, the allottee of restricted lands, who died before the expiration of the trust or restrictive period, by which she devised to her children and grandchildren such lands and all trust funds held by the United States to her use and benefit, in view of the provisions of the Act of February 14, 1913,

> Section 2, that one having an interest in any allotment held under trust, or any other patent containing restrictions or alienation, shall have the right, prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent, or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior, who may approve or disapprove the will, either before or after the death of the testator, and that neither circumstances shall operate to terminate the trust or restrictive period, but the Secretary of the Interior may in his discretion, cause a patent in fee to be issued to the devisee or devisees."

Mr. Justice McKenna delivered the opinion of the court. We quote from his language on page 953 of the L. Ed. of the Supreme Court Reports:

> The case is not in broad compass, and presents as its ultimate question the accordance or discordance of the laws of Congress and the laws of the state; and whether there is accordance or discordance depends upon a comparison of Section 8341 of the Oklahoma Code, upon which appellant replies and the Acts of Congress referred to in the bill, and what was done under them.
>
> That comparison we proceed to make. By Section 8341 of the Code, "Every estate and interest in real and personal property which to heirs, husband, widow or next of kin might succeed, may be disposed of by will; Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath (323) more than two-thirds of her property away from her husband; * * *"

The provision of the Code is determinative, appellant contends, because the law of "descent and distribution" of Arkansas was made applicable to the Indian Territory May 2, 1890 (26 Stat. at L. 94, 95 chap. 182), and extended its application in 1904 (April 28, 1904, 33 Stat. at L. 573, chap. 1824); and while at those times "testamentary power had not been given to restricted allottees (the property in this case was a restricted allotment, and the period of restriction had not expired) of any tribe, but property descended as to all tribes, wherever located, according to the local law," yet when Oklahoma was admitted as a state, the Arkansas Law was superseded by the Oklahoma Code. For this *Jefferson* v. *Fink*, 247 U. S. 288, 62 L. Ed. 1117, 38 Sup. Ct. Rep. 516, is adduced.

But against the contention and conclusion the Act of Congress approved February 14, 1913 (37 Stat. at L. 678, chap. 55, Comp. Stat. Sec. 4228, 3 Fed. Stat. Anno. 2d Ed. p. 855), is opposed. Section 2 of the act is as follows:

"Sec. 2. That any persons of the age of twenty-one years having any right, title or interest in any allotment held under trust or other patents containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: * * *."

On page 954 the court speaking through Mr. Justice McKenna said:

"And the further contention is that Section 8341 is continued because the Act of Congress does not expressly provide how the land shall be devised,

and because it recognized the state laws of descent are applicable in case the Secretary disapproves the will after the death of the testator.

If the first contention be true, the Act of Congress is reduced to impotence by its contradictions. According to its contention it permits a will, and immediately provides for its defeat at the very instant it is to take effect and can only take effect. Such antithetical purpose cannot be imputed to Congress, and it is repelled by the words of Section 2. They not only permit a will, but define its permissible extent, excluding any limitation or the intrusion of any qualification by state law. They provide that one having an interest "in any allotment held under trust or other patent containing restriction or alienation * * * shall have the right prior to the expiration of the trust restrictive period and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will in accordance with regulations to be prescribed by the Secretary of the Interior. * * *"

And we agree with the Court of Appeals that the Act of Congress was the prompting of prudence to "afford protection to dependent and natural heirs against the waste of the estate as the result of unfortunate marriage, and enforced inheritance by state law. * * *"

On page 955, Mr. Justice McKenna concluded the opinion of the court in the following language:

"Our conclusion is the same as that of the Court of Appeals, 'that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under the Act of Congress, free from restrictions on the part of the State as to the portions to be (327) conveyed,

> or as to the objects of the testator's bounty; provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior.' The court added that the conclusion was in accord with the views of the Supreme Court of the state, referring to *Brock* v. *Keifer*, 59 Okla. 5, 157 Pac. 88."

In the case of *Blanset* v. *Cardin, supra.* It may be said that the testatrix was a restricted allottee of the Quapaw Tribe; that her will was subject to the approval of the Secretary of the Interior; that the Act under which she devised her estate was not applicable to the Five Civilized Tribes, but a comparison discloses the fact that the Act in the Blanset-Cardin case and the act in the case at bar are analogous in this essential respect. That both confer the right to devise without limitation as to portions of property to be devised and without restrictions as to the devisees to be selected.

State sovereignty is jealous of the inherent power of Congress to legislate for Indian Wards. The judgment in the case at bar justifies this conclusion. The prohibition of a state statute against the bequest by a married woman, of more than two-thirds of her property away from her husband, has been invoked to defeat the will of a Choctaw woman who devised her restricted homestead allotment and ten acres of her unrestricted surplus allotment to her grandchildren under a provision of the Federal law.

If Section 8341 of the Code of Oklahoma is a limitation on Section 23 of the Act of Congress of April 26, 1906, the policy of the Government to protect natural

heirs against the results of unfortunate mercenary marriages and enforced inheritance is deterred and defeated and the power of Congress to pass legislation for the protection of a dependent people is ignored and destroyed by a state law.

We earnestly contend that the judgment of the Supreme Court of Oklahoma should be reversed by this honorable court.

Respectfully submitted,

REFORD BOND,
Attorney for Appellants.

BOND, MELTON & MELTON,
Of Counsel.

No. 7[redacted]278

IN THE

Supreme Court of the United States

JAMES H. BLUNDELL, EXECUTOR OF THE LAST WILL AND TESTAMENT OF PATSY POFF, DECEASED, JUANITA BLUNDELL, OLETA BLUNDELL, PATSY BLUNDELL, MINORS, JAMES H. BLUNDELL, LEGAL GUARDIAN OF SAID MINORS, APPELLANTS,

VS.

W. R. WALLACE, APPELLEE.

REPLY BRIEF OF APPELLANTS.

REFORD BOND,
Attorney for Appellants.

BOND, MELTON & MELTON,
Of Counsel for Appellants.

No. 788.

IN THE

Supreme Court of the United States

JAMES H. BLUNDELL, EXECUTOR OF THE LAST WILL AND TESTAMENT OF PATSY POFF, DECEASED, JUANITA BLUNDELL, OLETA BLUNDELL, PATSY BLUNDELL, MINORS, JAMES H. BLUNDELL, LEGAL GUARDIAN OF SAID MINORS, APPELLANTS,

VS.

W. R. WALLACE, APPELLEE.

ARGUMENT AND AUTHORITIES.

The first authority cited in the brief of the appellee is the case of *Hill* v. *Buckholts*, 75 Okla. 196; 183 Pac. 42. Said case is not in the same category with the case at bar. The parties to the suit are not of Indian blood, the lands devised are not Indian allotments and therefore the questions raised in said case are entirely different from the issues involved in this action.

The next authority cited by counsel for appellee is the case of *George* v. *Robb*, 64 S. W. 615. Said case is not parallel with the case at bar for the reason that

the cause of action accrued in 1901, five years prior to the passage of the Act of Congress of April 26, 1906, which provides that:

> "Every person of lawful age and sound mind, may by last will and testament, devise and bequeath all of his estate, real and personal, and all interests therein."

And for the further reason that said cause of action arose more than eight or nine years before Section 8341 of the Oklahoma Code was adopted which provides:

> "Nor shall any woman while married bequeath more than two-thirds of her property away from her husband."

Said case is not in point for the further reason that the parties to the suit are citizens of the Creek Nation and not members of the Choctaw Tribe of Indians. In 1901 the Choctaws were without authority to execute wills under the laws of Arkansas then in force in the Indian Territory.

> "Prior to March 4, 1904, the Chickasaw Indians had the right to dispose of their devisable property by wills made in accordance with the laws of the Chickasaws, the proper Chickasaw Probate Court had jurisdiction to probate these wills, and its judgments are impervious to collateral attack."
>
> (*Hayes* v. *Barringer*, 168 Fed. page 221.)

> "Act of Congress June 28, 1898, c. 517, 30 Stat. 504, 28, divested the tribal courts in the Indian Territory of all jurisdiction in all cases, abolished the courts and conferred their jurisdiction on the United States courts, but Section 29

(page 505) declared that such should only be the case if the Atoka Agreement which was part of the act should not be ratified, the act should then only apply to the Choctaw and Chickasaw tribes, where it did not conflict with the provisions of the agreement. The agreement was ratified within the time prescribed, and it declared that the United States courts in Indian Territory should have exclusive jurisdiction of all controversies growing out of the titles, ownership, occupation, possession or use of real estate and all persons charged with certain crimes committed in the Indian Territory. *Held*, that the agreement repealed so much of the Act of June 28, 1898, as attempted to withdraw probate jurisdiction from the tribal courts of such nations and vest it in the territorial courts, and that prior to the Act of Congress, April 28, 1904, c. 1824, 33 Stat. 573, which took from the Indian courts all jurisdiction and conferred it on the United States courts, the latter courts had no jurisdiction to appoint a guardian for a Chickasaw minor."

(*In re Poff Guardianship*, 103 S. W. page 765.)

By the Act of May 2, 1890, there was put in force in the Indian Territory, Chapter 155 of Mansfield's Digest of the Statutes of Arkansas, entitled "Wills and Testaments." There was a hiatus, however, between the Act of May 2, 1890, and the Act of April 28, 1904, in which the laws of Arkansas on "Wills and Testaments," did not embrace persons of Choctaw and Chickasaw blood. By Section 2 of the Act of April 28, 1904, complete jurisdiction was conferred upon the district courts in the Indian Territory in the settlement of estates of decedents and guardianships of minors and incompetents.

whether Indians, freedmen or otherwise. After the passage of the Act of April 28, 1904, members of the Choctaw tribe of Indians could devise their alienable property under Mansfield's Digest of the Statutes of Arkansas.

Counsel for the appellee cite many cases that are not analogous to the case at bar for the reason that the cause of action in each instance arose when the Statutes of Arkansas, on "Wills and Testaments," were in force in the Indian Territory.

The case of *In re Brown's Estate*, 97 Pac. 613, 22 Okla. 216, is not in point with the case at bar. The court did not in said case construe the Act of Congress involved in this action and did not consider or discuss the Oklahoma Law of Wills involved herein. Said decision is based upon a provision of the Supplemental Creek Agreement and the laws of Arkansas governing wills, and neither said provision of the Creek Agreement, nor the laws of Arkansas governing wills are analogous to the Act of Congress involved in this case, or the laws of Oklahoma governing wills. The cause of action arose prior to the passage of the Act of April 26, 1906.

The case of *Taylor* v. *Parker*, 126 Pac. page 573, 33 Okla. page 199, 59 Law Edition 12, is not parallel to the case at bar. In said case the court held that the restrictions upon alienation by an Indian Allottee extended to a devisee by will and that the extension of the Arkansas laws to the Indian Territory enabled an Indian in said territory to devise all his alienable property by will in accordance with the laws of the State of Arkansas, but did not operate to remove restrictions on alienation

of an Indian allottee. The court in rendering the opinion in said case did not consider the Federal Act in question conferring power and authority on allottees to alienate by will, and did not consider the Statutes of Oklahoma with reference to the disinheritance of a parent, wife, spouse or child.

The case of *Jefferson* v. *Fink*, reported in 247 U. S. page 288, is not analogous in any way to the case at bar. Said case does not involve a construction of the Federal statute conferring power and authority on allottees to alienate their allotments by will; it does not involve a construction of the law of wills as set forth in the Statutes of Oklahoma; it does not involve the question as to whether or not said Federal Statute conflicts with said state statute, but simply holds that the Oklahoma law of descent is applicable to Indian allotments. The applicability of such law, however, is not disputed, there being no Federal law in conflict with same.

There is a marked distinction between the law of wills as set forth in Mansfield's Digest of the laws of Arkansas, and the law of wills as set forth in the Compiled Statutes of Oklahoma.

Section 6500 of Mansfield's Digest provides:

> "When any person shall make his last will and testament and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, such person so far as regards such children shall be deemed to have died intestate and such children shall be entitled to such proportion, share and dividend of the estate, real and personal of the testator as if he had died intestate, and such children

> shall be entitled to recover from the devisees and legatees in proportion to the amount of their respective shares."

Section 8341 of the Oklahoma Law provides:

> "Every estate and interest in real or personal property to which heirs, husband, widow or next of kin might succeed, may be disposed of by will, provided that no marriage contract in writing has been entered into between the parties, nor shall a man while married bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband, provided, further that no person who is prevented by law from alienating, conveying or incumbrancing real property while living shall be allowed to bequeath same by will."

The restriction of the Arkansas Statutes relates to the form of the will, "If the testator fails to mention the name of a child, he shall be deemed to have died intestate and such child shall be entitled to a proportionate share of the estate." This provision is not a hard and fast limitation or restriction. It can be avoided by the testator simply mentioning the name of the child, in other words, if a testator desires to disinherit a child, the will could be so drawn by counsel as to comply with the law, and the wishes of the testator. The restriction set forth in the Oklahoma law relates to the substance of the will and is an express limitation on the power of the testator to devise. It provides that no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath

more than two-thirds of her property away from her husband. This provision is binding upon the husband and wife alike, it cannot be avoided by either of them, it cannot be defeated by the form of the will. Counsel for the testator could not draw a will so as to escape the terms and provisions of the statute. This brief but succinct statement sets forth the clear distinction between the Arkansas and Oklahoma statutory restrictions with reference to wills.

Counsel for appellee at the outset of their argument assert:

> "It is contended by the appellee that by virtue of the provisions of the Enabling Act said section above quoted, applies to the will of a half blood Choctaw Indian who died since statehood."

The section referred to by counsel is that provision of the Oklahoma Code which provides:

> "Nor shall any married woman while married bequeath more than two-thirds of her property away from her husband."

The reservations of the Enabling Act refutes such a contention, Section 1 of said Act prohibits the State of Oklahoma from placing anything in its constitution that shall be construed TO LIMIT OR IMPAIR THE RIGHTS OF PERSONS OR PROPERTY PERTAINING TO THE INDIANS OF SAID TERRITORY OR LIMIT OR AFFECT THE AUTHORITY OF THE UNITED STATES GOVERNMENT TO MAKE ANY LAWS or regulations, respecting the

Indians, their lands, property or otherwise. Said section reads as follows:

> "That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed."

Section 8341 of the Oklahoma Code was enacted by the Oklahoma Legislature after the passage of the Enabling Act, and after the advent of statehood.

Counsel for the appellee contend that the provision of the Oklahoma code, which provides:

> "Nor shall any married woman, while married bequeath more than two-thirds of her property away from her husband."

is determinative for the following reasons, that the Act of Congress of May 2, 1890, extended in force in the Indian Territory, Chapter 55, of Mansfields' Digest, on wills and testaments, and that Section 2 of the Act of April 28, 1904, made all of the laws of Arkansas theretofore put in force in the Indian Territory, applicable to

Indians and their property, WERE NOT INCONSISTENT WITH THE ACTS OF CONGRESS GOVERNING THE SAME, and that Congress provided in the Enabling Act, Section 13, that the laws in force in the territory of Oklahoma, SO FAR AS APPLICABLE, shall extend over and apply to said state until changed by the legislature thereof, and that when Oklahoma was admitted as a state, the Arkansas law was superseded by the Oklahoma code, but, against this contention and conclusion of counsel for appellee, the Act of Congress of April 26, 1906, is opposed. It is in conflict with said provision of the Oklahoma Code, said provision of the Oklahoma Code is inconsistent with said act and is inapplicable.

Section 23 of said act provides:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein; Provided: That no will of a full blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse or children of such full blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner."

In our original brief we presented the argument and authorities upon which appellant relies for a reversal of this cause. In our reply brief we have simply answered and replied to the argument presented for counsel for appellee, and have distinguished the authorities presented by them from the case at bar.

In conclusion we re-assert that Section 8341 of the Oklahoma Code cannot be invoked to defeat the will of a Choctaw Indian woman who devised a part of her allotment selection under the terms and provisions of Section 23 of the Act of April 26, 1906.

Respectfully submitted,

REFORD BOND,
Attorney for Appellant.

BOND, MELTON & MELTON,
Of Counsel for Appellant.

In the Supreme Court of the United States

No. 276

JAMES H. BLUNDELL, Executor of the Last Will and Testament of PATSY POFF, Deceased, JUANITA BLUNDELL, OLETA BLUNDELL and PATSEY BLUNDELL, Minors, JAMES H. BLUNDELL, Legal Guardian of said Minors, *Appellants*,

vs.

W. R. WALLACE, *Appellee*.

Brief of Appellee

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In the Supreme Court of the United States

No. 788.

JAMES H. BLUNDELL, Executor of the Last Will and Testament of PATSY POFF, Deceased, JUANITA BLUNDELL, OLETA BLUNDELL and PATSY BLUNDELL, Minors, JAMES H. BLUNDELL Legal Guardian of said Minors, *Appellants.*

vs.

W. R. WALLACE, *Appellee.*

STATEMENT OF CASE

This cause originated in the District Court of Garvin County, Oklahoma, wherein appellee, W. R. Wallace, was plaintiff, and appellants herein were defendants. The purpose of the suit was to declare the will of Patsey Poff, a half-blood Choctaw Indian, void as to a one-third interest in her allotment, the said Wallace being the owner of said one-third interest by mesne conveyances from David H. Poff, the surviving husband of

Patsy Poff, deceased, who died on August 7th, 1916. The judgment of the trial court was in favor of plaintiff quieting the title of plaintiff as against the will of Patsy Poff, and decreeing said Wallace to be the owner of an undivided one-third interest in and to said lands mentioned in said petition, ten acres of same constituting a portion of the surplus allotment and the remainder constituting the homestead allotment of said Patsy Poff, deceased. Said cause was tried on a stipulation of facts and pleadings which appear in brief of appellants. The judgment of the trial court was sustained by the Supreme Court of the State of Oklahoma in an opinion handed down on October 9th, 1923, reported in 220 Pac. 40.

ARGUMENT AND AUTHORITIES

While appellants subdivide their argument under three heads we think the sole question involved in said appeal is whether or not Section 11224 Compiled Statutes of Oklahoma, as follows:

> "Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will: Provided, that no marriage contract in writing has been entered into between the parties; *no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband;* Provided further, that no person who is prevented by law from alienating, conveying, or encumbering real property while living shall be allowed to bequeath same by will."

applies to the will of a half-blood Choctaw Indian as to her allotted lands. Said provision has been under consideration by the Oklahoma Supreme Court in the case of *Hill* v. *Buckholts*, 75 Okla. 196, 183 Pac. 42.

The question presented for determination in this case has never before been directly passed upon by this court.

It is contended by the appellee, and the decision of the trial court sustained such contention, that by virtue of the provisions of Enabling Act said section above quoted applies to the will of a half-blood Choctaw Indian who died since statehood. The deceased in the case at bar died in 1916.

By the Act of May 2, 1890, there was put in force in the Indian Territory, Chapter 155 of Mansfield's Digest of the Statutes of Arkansas, entitled "Wills and Testaments," Section 31 of said Act (26 Stat. 81) provides in part as follows:

> "That certain general laws of the State of Arkansas in force at the close of the session of the General Assembly of that state of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, * * * 'to descents and distributions, Chapter forty-nine' * * * 'and to wills and testaments, Chapter one hundred and fifty-five'."

Section 2 of the Act of April 28, 1904 (33 Stat. 573) provides as follows:

> "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the District courts in said territory in the settlement of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise."

The above quoted provisions of the Congressional legislation embraces all that Congress had said relating to the making of wills by Indians, of whatever degree of blood, prior to the passage of the Acts of April 26, 1906, wherein it was provided:

> Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court, or a United States Commisioner."

The importance of a correct determination

of this question cannot be overestimated, for the construction placed thereon by counsel for plaintiffs in error will have the effect of completely revolutionizing the established public policy of this state and of annihilating the protection that has been thrown around the home and family relationship by the beneficent provisions of the Constitution and statutes relating to the public policy of descent. For if this construction applies to a citizen of one-half Indian blood, it must necessarily also apply to a citizen of one-sixty-fourth Indian blood or one-one-hundred twenty-eighth, or even to the inter-married white citizen, who obtained, by virtue of his marriage and adoption into the tribe, the right of allotment. Such strained and technical construction casts them scot-free from the restraint which a wholesome public policy of this state has cast about a married person who attempts to dispose of his property by will.

Such restraint is wholesome and is founded upon a changed theory of law from the rights of married persons as such rights existed at common law. In this state the theory of separate and individual ownership of property is recognized to

the fullest extent, notwithstanding the marital relationship. The right of dower and of curtesy has been abolished and the spouse as such has no interest whatever in the sole and separate property of the other spouse during the lifetime of such other, but either party, though married, may sell and dispose of all of his property without let or hindrance even against the will and consent of the other spouse, and restrictions are placed around only the sacred homestead.

In construing legislation the court will search the mind of Congress and ascertain the evil which is sought to alleviate by its legislation. *Grayson* v. *Thompson*, 186 Pac. 236 (Okla.) *Tiger* v. *Western Investment Co.*, 221 U. S. 309, 31 Sup. Ct. 578, 55 L. Ed. 738. To enable this court to analyze and deduce the meaning of the language used by the Act of 1906, let us briefly allude to the contemporary historical conditions that existed, and the prior and subsequent law applicable thereto.

As hereinabove set out, by the Act of May 2, 1890, the law of wills and testaments and of descents and distributions of Arkansas was placed in effect. It has ever been a moot question wheth-

er or not by said act the law of wills applied prior to the Act of 1904 as to the Indians of the Choctaw and Chickasaw Nations, and in order to relieve the well founded doubt on this question, Congress enacted Section 2 of the Act of April 28, 1904, supra. At the time of the passage of said act, two systems of courts were attempting to mete out justice in the then Choctaw and Chickasaw Nations, one having jurisdiction over the persons, and property of white citizens, the other having jurisdiction over the persons and property of Indian citizens, with much confusion existing, and many serious questions arising as to jurisdiction, and under what system, when the rights of white persons and Indians became involved in the same litigation.

In a decision of the Court of Appeals of the Indian Territory rendered on October 4, 1901, in the case of *George* v. *Robb,* 64 S. W. 615, the second syllabus is:

> "Under the Ind. T. Ann. St. 1899, Sec. 3572 (Mansf. Dig. Ark. Sec. 6500), providing that a testator omitting to mention a living child shall be deemed to have died intestate as to such child, entitling it to a share of the estate, an intentional or accidental omission to mention a child, though not invalidating the will as to those men-

tioned, entitled such child to apply to the court for relief."

In construing the provisions of the above quoted law as to the will of a Creek citizen, the court applied the restrictions of the Arkansas law to said will.

In the case of *In Re Brown's Estate*, 97 Pac. 613, 22 Okla. 216, the State Supreme Court discussed the contemporary situation existing at said time, which discussion we deem pertinent to the background of the issues in this proceeding. We request that said decision be read by this court, and quote therefrom only the first and second paragraphs of the syllabus of said case, as follows:

"Chapters 49, 155 Mansf. Dig. (Ind. T. Ann. St. 1899, cc 21, 58), entitled 'Descents and Distribution,' and 'Wills and Testaments,' respectively, as modified by Acts of Congress (Act May 2, 1890 c 182, 26 Stat. 81; Act June 30, 1902, c. 1823, 32 State, 500) were in force in the Creek Nation on the 13th day of November, 1905."

"There being no children born to a non-citizen Creek allottee after the 25th day of May, 1901, she was entitled to dispose of her homestead by will, and such devise was subject to the limitation contained in Section 6500, Mansf. Dig. (Ind. T. Ann. St. 1899, Sec. 3572), which reads: 'When any person

shall make his last will and testament, and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, every such person so far as regards such child, shall be deemed to have died intestate, and such child shall be entitled to such proportion, share, and dividend of the estate, real and personal, of the testators if he had died intestate; and such child shall be entitled to recover from the devisees and legatees in proportion to the amount of their respective shares, and the court exercising probate jurisdiction shall have power to decree a distribution of such estate according to the provisions of this and the preceding sections."

It was thereafter determined by the Supreme Court of this state in the case of *Taylor* v. *Parker*, 33 Okla. 199, 126 Pac. 573, 235 U. S. 42, 35 Sup. Ct. 22, 59 L. Ed. 12, that, while the laws of Arkansas relating to wills applied to Indian citizens, yet said Indians were possessed of a certain class of property, to-wit, their allotments, which they were powerless to devise by will by reason of the fact that the making of a will constituted an alienation in violation of the Supplemental Agreement with the Choctaws and Chickasaws, providing that said property should remain inalienable during a certain period of time.

(See Act July 1, 1902, Sec. 1902, 36 Stat. 642). The second syllabus of said case is as follows:

> "The effect of the Act of April 28, 1904, (33 Stat. 573, C. 1824), was to make the laws of Arkansas theretofore put in force in the Indian Territory, applicable to another class of persons and estates, to-wit, Indians and their property, insofar as it was alienable under the Acts of Congress then bearing upon it. The extension of the law of wills enabled the Indian to devise all his alienable property by will made in accordance with the laws of the State of Arkansas, but did not operate to remove any of the restrictions theretofore placed upon lands of Indians by Act of Congress."

See also:

Hayes v. *Barringer*, 168 Federal 221 (C. C. A.)
Wilson v. *Greer*, 151 Pac. 629, 50 Okla. 387;
Chouteau v. *Chouteau*, 152 Pac. 373, 49 Okla. 105;
Reece v. *Benge*, 198 Pac. 493, 82 Okla. 69.

In the case of *Washington* v. *Miller*, 235 U. S. 422, 59 L. Ed. 295, this court, in discussing the situation relating to the descent of the lands of Creek citizens, said:

> "Before coming to the provisions of those acts, it may be helpful to refer to the situation existing at the time of their enact-

ment. Long prior thereto the Creek Nation had adopted laws of its own regulating the descent and distribution of property of its citizens dying intestate. Creek Laws of 1876, Sec. 6; Perryman's Compiled Creeks Laws of 1890, Sec. 6, p. 32, Sec. 8, p. 76; Bledsoe's Indian Land Laws, 2d Ed. Secs. 829-831. Congress also had dealt with that subject. By the Act of May 2, 1890 (26 Stat. at L 81, Chap. 182), Secs. 30 and 31, it had 'extended over and put in force in the Indian Territory' several general laws of the State of Arkansas, among which was Chapter 49 of Mansfield's Digest of 1884, relating to descent and distribution. At first the operation of this act was materially restricted by a proviso declaring that "the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the laws of the State of Arkansas extended over and put in force in said Indian (425) Territory by this act shall not apply.' But the proviso lost much of its force when the Act of June 7, 1897 (30 Stat. at L. 83, Chap. 3), declared that 'the laws of the United States and the State of Arkansas in force in the (Indian) Territory shall apply to all persons therein, irrespective of race,' and was practically abrogated when the Act of June 28, 1898 (30 Stat. at L. 495) (Chap. 28), and provided (Chap. 26) that 'the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian

Territory.' Of course, these congressional enactments operated to displace the Creek tribal laws of descent and distribution, and to substitute in their stead the Arkansas law as expressed in Chapter 49 of Mansfield's Digest."

In the case of *Taylor* v. *Parker, supra,* 235 U. S. 422, 59 L. Ed. 12, the court said:

"A further and distinct argument is based upon the act to provide for additional judges, etc., of April 28, 1904, Chap. 1824, Sec. 2, 33 Stat. at L. 572, to the effect that all the laws of Arkansas theretofore put in force in the Indian Territory are extended to embrace all persons and estates in said territory, whether Indians, freedmen, or otherwise, and full jurisdiction is conferred upon the District Courts in the settlement of all estates of decedents, and the guardianship of minors and incompetents, whether Indians, freedmen or otherwise. The Arkansas law of wills was a part of the law that thus had been adopted for the Indian Territory before 1904, and it is contended that the result of the above extension was to free the Indians from the restrictions so specifically imposed upon them in 1902. Of course, nothing of that sort was intended. As said below, the extension enabled 'the Indian to devise all his alienable property by will *made in accordance with the laws of the State of Arkansas,* but did not operate to remove any of the restrictions theretofore placed upon lands of Indians by Act of Congress.' That this was the understanding of Congress is

indicated by the Acts of April 26, 1906, Chap. 1876, Sec. 23, 34 Stat. at L. 137, 145, and May 27, 1908, Chap. 199, 35 Stat. at L. 312, giving Indians power to dispose of their allotments by will."

In the case of *Jefferson* v. *Fink,* 38 Sup. Ct. 516, 247 U. S. 288, the Supreme Court of the United States, in holding that the laws of Oklahoma had been substituted, by virtue of the Enabling Act and Constitution and Schedule thereto, for the laws of descent theretofore governing descent of allotments of Indians of the Five Civilized Tribes, said:

"By acts passed in 1890, 1893, 1897 and 1898, Congress manifested its purpose to allot or divide in severalty the lands of the Five Civilized Tribes with a view to the ultimate creation of a state embracing the Indian Territory; put in force in the territory several statutes of Arkansas, including Chapter 49 of Mansfield's Digest relating to descent and distribution; provided that those statutes should apply to all persons in the territory, irrespective of race; and substantially abrogated the laws of the several tribes, including those relating to descent and distribution. Acts May 2, 1890, c. 182, 26 Stat. 81, Sec. 31; March 3, 1893, c. 209, 27 Stat. 645, Sec. 16; June 7, 1897, c. 3, 30 Stat. 83; June 28, 1898, c. 517, 30 Stat. 495, Secs. 11 and 26. This was the situation when the Act of 1901, known as the Original Creek Agreement, was adopt-

ed. That act in the course of providing for the allotment in severalty of the lands of the Creeks revived their tribal law of descent and distribution by making it applicable to their allotment (Sections 7 and 28). But the revival was only temporary, for the Act of 1902, known as the Supplemental Creek Agreement, not only repealed so much of the Act of 1901 as gave effect to the tribal law but reinstated the Arkansas law with the qualification that Creek heirs, if there were such, should take to the exclusion of others. *Washington* v. *Miller*, 235 U. S. 422, 4250426 Sup. Ct. 119, 59 L. Ed. 295. The allotment in question was made and the tribal deed issued shortly after the Act of 1902 became effective. And this was followed by the Act of April 28, 1904, c. 1824, 33 Stat. 573, Sec. 2, declaring that all statutes of Arkansas theretofore put in force in the Indian Territory should be taken "to embrace all persons and estates in said territory whether Indian, freedmen, or otherwise."

"Referring to the purpose with which the Arkansas statutes were put in force in that territory and to their status there, this court said in *Shulthis* v. *McDougal*, 225 U. S. 561, 571, 32 Sup. Ct. 704, 707 (56 L. Ed. 1205):

> 'Congress was then contemplating the early inclusion of that territory in a new state, and the purpose of those acts was to provide, for the time being, a body of laws adapted to the needs of the locality and its people in respect to matters of local or domestic concern. There

doing no local Legislature, Congress alone could act. Plainly, its action was intended to be merely provisional.' * * * "

By the Enabling Act of June 16, 1906, c. 3335, 34 Stat. 267, provision was made for admitting into the Union both the Territory of Oklahoma and the Indian Territory as the State of Oklahoma. Each territory had a distinct body of local laws. Those in the Indian Territory, as we have seen, had been put in force there by Congress. Those in the territory of Oklahoma had been enacted by the territorial Legislature. Deeming it better that the new state should come into the Union with a body of laws applying with practical uniformity thoroughout the state, Congress provided in the Enabling Act (Section 13) that 'the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof,' and also (Section 21) that 'all laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the Constitution of the state.' The people of the state, taking the same view, provided in their constitution (Article 25, Sec. 2) that 'all laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law.'

> "The state was admitted into the Union, November 16, 1907; and thereupon the laws of the territory of Oklahoma relating to descent and distribution (Rev. Stat. Okla. 1903, c. 86, Art. 4) became laws of the state. Thereafter Congress, by the Act of May 27, 1908, c. 199, 35 Stat. 312, Sec. 9, recognized and treated 'the laws of descent and distribution of the State of Oklahoma' as applicable to the lands allotted to members of the Five Civilized Tribes."

It is manifest that at the time of enactment of Section 23, *supra*, Indians of the Five Civilized Tribes were wholly without capacity to alienate their allotments by will by reason of Congressional restrictions. We assert that the legislative intent of the Congressional Act of April 26, 1906, was not to revoke the policy that had been manifested in all of the legislation of Congress since 1890, of making the rights and property of Indian citizens of the United States subject to the local jurisdiction, but that Congress intended only to remove any barrier or restriction against the right of an Indian citizen of less than full-blood to dispose of his property, *including his allotment*, by will, subject, however, to the applicable provisions of the State law. In other words, it was the intent of Congress to place the Indian

citizen upon the same basis and to place his right to alienate by will upon the same foundation as the right to so alienate by the local white citizen. And as stated before, to hold otherwise will be to discard not only the clearly announced public policy of the State of Oklahoma, but will also be to discard the express public policy of Congress, in conferring the right of citizenship upon its Indian wards and its frequently expressed policy of subjecting these new citizens to the jurisdiction of local courts and local laws.

We are not unmindful of the fact that the State court has frequently manifested some temerity in announcing and following the general public policy of this state when the rights of Indian citizens were involved. Nor are we unmindful of the fact in an *obiter* expression by a commissioner of said court language inconsistent with the position taken by defendant in error above has been used. Nor are we unmindful of the fact that it is difficult at all times to keep in mind the rights of the two classes of citizens of the state. The line of demarcation as to the sphere of Congress and the sphere of the state is not always clear-cut, but the State Court in the case of *Burtschi* v. *Wolfe*, 198 Pac. 306, 82 Okla. 27, clear-

ly announced, we think, the correct doctrine as follows:

> "In reaching this conclusion we reject the premise assumed by counsel for the defendant in error that before an Indian is entitled to sell his lands, either inherited or allotted, we must be able to point our finger to some Act of Congress specifically authorizing such sale. In our judgment the opposite presumption is true. Indians, unless they are restricted, either in their person or their property, by some specific Act of Congress *or applicable state law*, have the same right to dispose of their property as white citizens of the state and of the United States. It is true that where either specific personal or property restrictions have been imposed by law, acts removing such restrictions must be liberally construed in favor of the Indians. But where there are no restrictions imposed by law the court is not justified in assuming their existence."

As was said in the case of *Tucker* v. *Leonard*, 76 Okla. 16, 183 Pac. 907, in discussing the effect of certain Acts of Congress placing in effect over Indian citizens the law of guardianship as the same exists in the State of Oklahoma:

> "It would appear that, when Congress gave the Probate Courts of Oklahoma full and complete jurisdiction over the person and estate of minors, it was intended that the laws of Oklahoma relating to guardians should apply. (Any other construction in

many instances would nullify the statutes of Oklahoma concerning the competency of persons for guardianship. The provisions of the Oklahoma statutes providing that the father, and in case of his death, the mother, being single, should have the preferential right to the guardianship of their minor children, would be denied; that is, in the case of the father not being a Creek citizen, though married to a Creek woman, by whom he had several children, and the father was dead. In the first instance mentioned, the father, under this provision of Section 4, *supra*, would not be qualified to act as guardian of his own children, notwithstanding he might in all other respects be entirely qualified; and in case of his death, the mother, notwithstanding her qualifications in every other respect, would not be competent. We cannot believe that it was ever intended for the section to go to that extent."

In the case of *Belt* v. *Bush*, 176 Pac. 935, --- Okla. ---, the State Court held that the allotment of a full-blood Indian descended to the heirs subject to the burden of the homestead right of the surviving wife, the fourth syllabus being as follows:

"The right of the surviving spouse to possess and occupy land occupied and used by the deceased spouse and family as a homestead under the provisions of Section 6328, R. L. 1910, applies to an allotment of a full-blood Indian of the Five Civilized Tribes

used and occupied by such Indian and her family as a homestead."

In the case of *Sperry Oil & Gas Co.* v. *Chisholm*, 282 Fed. 93, the court said:

> "In view of the Enabling Act, Sec. 21; Const. Art. 12, Secs. 1, 2; Rev. Laws, 1910, Secs. 1143, 3343, where a husband executes a renewal lease on the homestead embracing allotted lands, it is void under the Act of Congress, May 27, 1908, Secs. 1, 2, requiring leases of such land to be approved by the Secretary of the Interior, as the approval of the Secretary of the Interior, of a lease invalid under the law of Oklahoma, cannot give validity to the lease, *as both the state and federal laws are given full force and effect.*"

We have no contention to make or with counsel for appellants that, when Congress has expressed its will with reference to Indian citizens, any conflicting state statute must fall. The construction of the proviso to Section 11224 of Compiled Laws of 1921, as set forth in the case of *Walker* v. *Brown*, 43 Okla. 144, 141 Pac. 681, and *In Re Allen's Will*, 44 Okla. 392, 144 Pac. 1055, is undoubtedly a correct enunciation of the law with respect to the matters under consideration, for said proviso is in direct conflict with the plain provisions of the Act of 1906 as amend-

ed by the Act of 1908. Moreover, it is undoubtedly true that said act did not contemplate the operation of the proviso to said statutes as to Indian citizens who are specifically granted the right and authority by Congress to make wills, notwithstanding certain restrictions against alienation of their lands.

But we believe it unanswerable that Congress, having granted the right to Indian citizens to make wills, and having provided that the law of wills, of the State of Oklahoma "as far as applicable" and "except as changed or modified by this act" (Enabling Act), should apply to Indian citizens, had in mind the supervision of the state government as to the object of the testator's bounty. Would it be reasonable to contend that by virtue of the provisions of the Act of 1906 granting the authority to Indians to make a will that such Indians could legally make a will to a corporation in violation of Section 11225, Compiled Laws? Could it be contended with reason that Section 11254, Compiled Laws, requiring provision for after-born children has no field of operation as to Indian citizens by virtue of the blanket authority given under the

Act of 1906? Does Section 11255 of Compiled Laws making provision for children unintentionally omitted have no field of operation as to an Indian citizen? And if we are to look solely to the Congressional Act as to the right of an Indian to make a will, why should we require that said will comply in all respects as to attestation with the laws of the State of Oklahoma?

We believe that it was clearly the intent of Congress to give operation to both the federal and state law as to the making of wills by Indian citizens and unless state laws are clearly in conflict with the Federal Enactments, the courts should not hamper the public policy of the state, and, as we believe, the public policy of Congress, in subjecting Indian citizens and their property rights to the local jurisdiction and to local laws.

Prior to the Act of 1906 the Indian citizen was without power to alienate his allotment by will, which disability was by the Act of 1906 removed. The state statute is not in conflict with the right given to him by said Act for such Indian citizen can still enjoy said privilege. But if he makes a will, such will must be in compliance with the Oklahoma law and he must will one-third

of his property to his surviving spouse, and the other two-thirds of his property he may devise to whomsoever he may desire with no federal or state restriction.

Counsel for appellants rely solely for a decision of this case upon the case of *Blanset* v. *Cardin*, 261 Fed. 309, 256 U. S. 319, 41 Sup. Ct. 519, and to the case of *Brock* v. *Kiefer*, 59 Okla. 6, 157 Pac. 88. An analysis of these cases clearly eliminates them as persuasive authority on the question involved herein.

The case of *Brock* v. *Kiefer* was an opinion by the late COMMISSIONER COLLIER. The question of the validity of the devise was attempted to be raised by the husband on a contest of the probate of said will. The learned commissioner, in announcing and following the rule which has been enunciated repeatedly by the State Court, held that said question was not before the court because the only issue triable on an application to probate a will was the question of *devisavit vel non*. On page 91 he used the following language:

> "But the effect of said Section 8341 cannot legally be considered in passing upon a petition to probate a will, as the question

of the title to the property sought to be devised can in nowise arise or be determined in an application to probate a will, or in anywise affect the question of probate."

We are surprised that the commissioner, after so succinctly defining the issues presented by said record, should have gone further and discussed briefly the question involved in the case at bar. Doubtless the question was not briefed, or considered maturely by the court, for he bases his opinion upon the case of *Walker* v. *Brown*, 43 Okla. 144, 141 Pac. 681, which in nowise discussed the question in the case at bar, or the question alluded to by him.

An analysis of the case of *Blanset* v. *Cardin*, *supra*, demonstrates conclusively that it cannot act as an authority on which to predicate a decision in the case at bar. On the other hand, language is used therein which is favorable to the contentions of the appellee in this case.

The lands covered by said decision constituted the allotment of a Quapaw Indian, the title to which was evidenced by patent, reserving the title in the United States in trust for a period of twenty-five years. Prior to the Act of February 14, 1913, relating thereto (Compiled St. 4226)

said Indian was wholly without authority to alienate by will. It is to be noted first, that the act authorizing the making of said will was passed long after the Oklahoma laws became effective and applicable to the lands of Indians of the Five Civilized Tribes. In the second place, it is further to be noted that said act contained the following proviso:

> "Provided also that Sections 1 and 2 of this act shall not apply to the Five Civilized Tribes, or the Osage Indians."

In Section 1 of said act the Secretary of the Interior, as distinguished from the courts of Oklahoma, was given power upon notice and hearing, "*under such rules and regulations as he might prescribe,*" to ascertain the legal heirs of such decedent. Under Section 2, the Indian was given a right to dispose of his property by will "*in accordance with the regulations to be prescribed by the Secretary of the Interior.*" By a proviso to said section it is declared that, "*no will shall have any force or effect unless, and until, it shall have been approved by the Secretary of the Interior,*" and by a further proviso the Secretary of the Interior is given authority to "*approve or disapprove*" the will either "*before or after the death of the*

testator," and it is further provided that if "it *is subsequently discovered that there has been fraud in connection with the execution or procurement of the will, the Secretary of the Interior is hereby authorized, within one year after the death of the testator to cancel the approval of the will.* And it is further provided that the approval of the will and the death of the testator shall not operate to terminate the trust, but the Secretary of the Interior is given authority in his discretion to sell the land, notwithstanding the will and to apply the moneys, or so much thereof as may be necessary, for the benefit of the heir or heirs, etc. It was the plain provision of Congress, and the only reasonable construction that can be placed upon said act, that the laws of Oklahoma could have no field of operation as against the rights conferred upon said Indians and upon the Secretary of the Interior. And on this basis and for said reasons the Supreme Court of the United States affirmed the decision of the Circuit Court of Appeals.

However in said decision, without discussion by the Supreme Court of the United States, said

court quoted the assertion of appellants in said cause as follows:

> "The provision of the Code is determinative, appellant contends, because the law of descents and distributions' of Arkansas was made applicable to the the Indian Territory May 2, 1890 (26 Stat. 94, 95), and extended in its application in 1904 (33 Stat. 573), and, while at those times 'testamentary power had not been given to restricted allottees (the property in this case was restricted allotment and the period of restriction had not expired) of any tribe but promptly descended, as to all tribes, wherever located, according to the local law,' yet when Oklahoma was admitted as a state the Arkansas law was superseded by the Oklahoma Code. For this *Jefferson* v. *Fink*, 247 U. S. 288, 38 Sup. Ct. 516, 62 L. Ed. 1117, is adduced.'

Basing its ground for discarding said conclusion on the ground that the act above mentioned had been passed subsequently, the court further in said opinion said:

> "But against the contention and conclusion *the Act of Congress approved February* 14, 1913 (37 Stat. 678) *is opposed.*"

And thereupon the court analyzes said act to show that it is inapplicable by reason of its different provisions as above set forth.

Appellants suggest that the homestead allotment of this deceased is restricted Indian land

under the Act of Congress and that while 10 acres of the surplus is involved and the remainder of the land involved constitutes homestead there is a possibility of a distinction between the two allotments by reason of the fact that the surplus allotment is wholly unrestricted. We cannot believe that there is any distinction on this point for the question of the alienability of said lands is not called in question nor concerned in any way. Congress by its Act authorizing Indians to make wills dealt with both restricted and unrestricted lands and made the provision of the Oklahoma law "so far as applicable" apply to the wills of Indians conveying both restricted and unrestricted lands.

By Section 13 of the Enabling Act (34 Stat. L. 274) Congress provided "that the laws in force in the Territory of Oklahoma, so far as applicable shall extend over and apply to the said State until changed by the legislature thereof," and by Section 21 of said Act (34 Stat. L. 277) it provides,

> "And all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State except as modified or changed by this Act or by the Constitution of the State, and the Laws of the United

> States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States."

It would therefore seem from said provision of the Congressional enactment that the Congress definitely subjected the right of Indian citizens to make wills to the restrictions contained in the Oklahoma law.

Counsel for Appellants argue at some length that tht proviso to Section 23 of the Act of 1906, relating to the approval of wills of a full-blood Indians devising real estate is a restriction so far as applied to the case at bar. However the facts in controversy in this case in no manner involve the possible effects of the proviso to said section, and we deem that it is unnecessary to discuss what modicum of authority was retained by Congress by virtue of said proviso.

The opinion of the State Court in this case (220 Pac. 40) is a splendid expression of the public policy of the State and demonstrates a complete harmony between the public policy of Congress and the public policy of the State, and is founded upon an historical background which is compelling in its reasoning and in the final conclusion thereof.

We therefore conclude that the decision of the Supreme Court affirming the decree of the trial court, quieting the title of appellee, Wallace, in and to the undivided one-third interest in the lands mentioned in said petition is correct in principle; that Congress gave to the Indian citizen the right to make a will, subject, however, to the restraints of the Oklahoma law—not in conflict with the express provisions of Congress. and that Congress, having provided that the local law "so far as applicable" should apply to Indian citizens, among which laws was the law of Oklahoma relating to wills and to descent and distribution, this court should recognize the authority of the two jurisdictions and give effect to the Acts of each jurisdiction, in so far as they may not be in direct conflict, and should uphold the public policy of the State as to the devising of property away from the surviving spouse.

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CICERO I. MURRAY,
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(Lindsay, Okla.)

John B. Dudley

2. Hence the will of a married half-blood Choctaw woman devising her homestead and surplus allotments is subject to the provision of the Oklahoma law (Rev. L. 1910, § 8341), forbidding any woman while married to "bequeath more than two-thirds of her property away from her husband." *Id.*

96 Okla. 26, affirmed.

ERROR to a decree of the Supreme Court of Oklahoma which affirmed a decree in favor of the plaintiff, Wallace, in his suit to quiet title to an interest in certain Choctaw Indian allotments.

Mr. Reford Bond, for plaintiffs in error, submitted.

Mr. John B. Dudley, with whom *Mr. W. L. Farmer* and *Mr. Cicero I. Murray* were on the brief, for defendant in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit to quiet title to a one-third interest in homestead and surplus lands originally allotted to Patsy Poff, a half-blood Choctaw Indian woman, under the Act of July 1, 1902, c. 1362, 32 Stat. 641. She died August 7, 1916, David H. Poff, her husband, surviving. By her will made in 1912, which was duly probated, she devised the entire allotment to Juanita and Oleta Blundell, her great granddaughters, bequeathing to her husband only a nominal sum. Defendant in error asserts title through mesne conveyances vesting in him the interest of David H. Poff. His suit is based on the provisions of § 8341, Rev. Laws Okla. 1910 (§ 11224 Comp. Stats. Okla. 1921), which reads:

"Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will: Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath

more than two-thirds of his property away from his wife, *nor shall any woman while married bequeath more than two-thirds of her property away from her husband;* Provided, further, that no person who is prevented by law from alienating, conveying or encumbering real property while living shall be allowed to bequeath same by will."

Plaintiff in error contends that this statute as applied to Patsy Poff's will is in direct conflict with § 23 of the Act of Congress of April 26, 1906, disposing of the affairs of the Five Civilized Tribes, c. 1876, 34 Stat. 137, 145, and, therefore, invalid. Section 23 is as follows:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided,* That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner."

There was an amendment in 1908 in a detail not important here. It was held below that the state statute applied; that there was no conflict with the federal statute; that defendant in error was entitled to recover, and the decree went accordingly. 96 Okla. 26.

A brief reference to the state of the law at the time of the passage of § 23 will help to clear the way for a correct determination of the question. By §§ 12 and 16 of the supplemental agreement with the Choctaws and Chickasaws, ratified by the Act of July 1, 1902, *supra,* lands of the kind here involved were declared to be inalienable during specified periods of time. It is settled that this restriction against alienation extended to a disposition by will, *Taylor* v. *Parker,* 235 U. S. 42; and, but for § 23, it is plain that the devise in question, at least as to the homestead, would have been without effect.

But, it must be borne in mind, the restriction was in respect of the specified lands and did not affect the testamentary power of the Indians to dispose of their alienable property, which power, on the contrary, has been fully recognized, first, by an extension of the appropriate laws of Arkansas over the Indian Territory, and then, upon the admission of the State of Oklahoma, by the substitution therefor of Oklahoma law. *Taylor* v. *Parker, supra; Jefferson* v. *Fink,* 247 U. S. 288, 294. The general policy of Congress prior to the adoption of § 23, plainly had been to consider the local law of descents and wills applicable to the persons and estates of Indians except in so far as it was otherwise provided. Thus, by § 2 of the Act of April 28, 1904, c. 1824, 33 Stat. 573, the laws of Arkansas, theretofore put in force in the Indian Territory, were expressly "continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise," and jurisdiction was conferred upon the courts of the Territory in the settlement of the estates of decedents, etc., whether Indian, freedmen, or otherwise.

Section 23 must be read in the light of this policy; and, so reading it, we agree with the ruling of the state supreme court that Congress intended thereby to enable "the Indian to dispose of his estate on the same footing as any other citizen, with the limitation contained in the proviso thereto." The effect of § 23 was to remove a restriction theretofore existing upon the testamentary power of the Indians, leaving the regulatory local law free to operate as in the case of other persons and property. There is nothing in *Blanset* v. *Cardin,* 256 U. S. 319, cited to the contrary, which militates against this view. That case involved the will of a Quapaw woman devising her restricted lands away from her husband. It was held that § 8341 of the Oklahoma laws did not apply because it was in conflict with an act of Congress. But the act there

considered was very different from the one now under review. There the authority to dispose of restricted property by will was limited by the provisions of the Act of February 14, 1913, c. 55, 37 Stat. 678, that the will must be "in accordance with regulations to be prescribed by the Secretary of the Interior," and that no will "shall be valid or have any force or effect unless and until it shall have been approved" by that officer. By this language the intent of Congress to exclude the local law and to establish the regulations of the Secretary as alone controlling was made evident; and it was so held. But here the federal statute contains no provision of like character; it is without qualification except in the single particular set forth in the proviso; and, clearly, it does not stand in the way of the operation of the local law.

Affirmed.

BLUNDELL, EXECUTOR, ET AL. *v.* WALLACE.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 276. Argued January 29, 1925.—Decided March 2, 1925.

1. Section 23 of the Act of April 26, 1906, disposing of the affairs of the Five Civilized Tribes, which provides: "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein," was intended (save the proviso limiting full-bloods) to enable the Indian to dispose of his estate by will on the same footing as any other citizen, notwithstanding restrictions previously imposed against alienation of allotments (e. g., by Choctaw-Chickasaw Supplemental Agreement, July 1, 1902, §§ 12 and 16), leaving the regulatory local law of wills free to operate as in the case of other persons and property. P. 375.